

# **TRANSCRIPT OF RECORD.**

---

---

**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, [REDACTED] 1923**

**No. [REDACTED] 200**

---

**JAMES EVERARD'S BREWERIES, APPELLANT,**

**vs.**

**RALPH A. DAY, PROHIBITION DIRECTOR OF THE STATE  
OF NEW YORK, ET AL.**

---

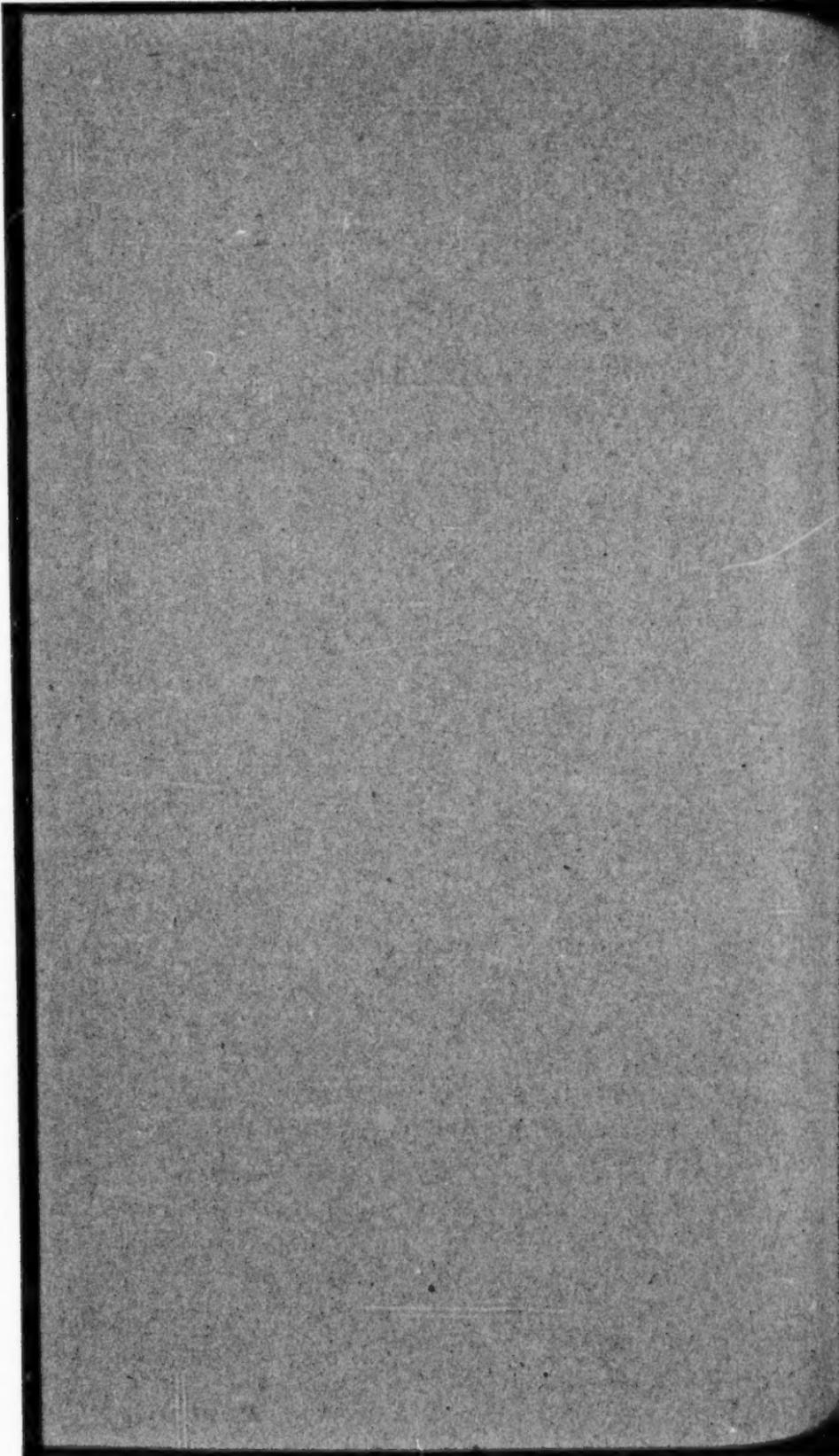
**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.**

---

---

**FILED JANUARY 18, 1923.**

**(29,351)**



(29,351)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 801.

JAMES EVERARD'S BREWERIES, APPELLANT,

v.s.

RALPH A. DAY, PROHIBITION DIRECTOR OF THE STATE  
OF NEW YORK, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

Original. Print.

Record from U. S. district court for the southern district of New York .....	1	1
Statement under rule 75.....	1	1
Summons .....	3	2
Amended bill of complaint.....	4	2
Exhibit A to Amended Bill—Eighteenth Amendment to Constitution of the United States.....	18	15
Exhibit B to Amended Bill—Amendments to regulation 60 of Bureau of Internal Revenue.....	19	16
Exhibit C to Amended Bill—Letter, R. A. Haynes to James Everard's Breweries.....	25	21
Exhibit D to Amended Bill—Permit No. N. Y. A-97, issued to James Everard's Breweries, Inc., November 15, 1921.....	27	22
Exhibit E to Amended Bill—Permit No. N. Y. A-98, issued to James Everard's Breweries, Inc., November 15, 1921.....	28	23

Exhibit F to Amended Bill—H. R. Bill 7294, entitled “An Act Supplemental to the National Prohibition Act” .....	29	24
Order amending amended bill.....	34	27
Stipulation for addition of David H. Blair as party defendant, etc.....	35	27
Motion to dismiss.....	36	28
Notice of motion for preliminary injunction.....	38	28
Affidavit of Bryan De Forrest Sheedy.....	40	29
Maurice J. Lewi.....	44	31
A. O. Gettler.....	47	32
Armin St. George.....	50	33
Ralph Hayward Pomeroy.....	72	44
William F. Cunningham.....	74	45
Herman Gliboff.....	77	46
Gustav Scholer.....	79	47
William J. Maroney.....	81	48
Graeme M. Hammond.....	83	48
Luigi Celano.....	85	49
William J. Matthews.....	87	50
Curt E. H. Nicolai.....	89	51
Antonio Arbona.....	91	51
Joseph Samenfeld.....	93	52
A. F. Zahn.....	95	53
C. T. Graham-Rogers.....	97	54
Samuel Dana Hubbard.....	100	54
Arthur M. Shipley.....	101	55
J. G. Vaughan.....	102	55
A. C. Prentiss.....	103	56
Alexander Lambert.....	104	56
H. G. Myers.....	105	56
D. S. Dougherty.....	106	57
John McCabe.....	107	57
Stipulation as to printing.....	108	57
Order denying temporary injunction and granting motion to dismiss .....	109	58
Judgment .....	110	58
Petition for and order allowing appeal.....	112	59
Bond on appeal.....	114	60
Assignments of error.....	117	61
Citation .....	119	62
Stipulation as to transcript.....	120	63
Clerk's certificate.....	121	64
Stipulation as to service of citation.....	122	64

**1 UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.**

JAMES EVERARD'S BREWERIES, Complainant,  
against

RALPH A. DAY, Federal Prohibition Director for the State of New York; Frank K. Bowers, Collector of Internal Revenue for the Second District of New York; William Hayward, United States Attorney, and David H. Blair, as Commissioner of Internal Revenue, Defendants.

**Statement Under Rule 75.**

This action was instituted on or about the 15th day of December, 1921, by the service of a subpoena following the filing of the original complaint. The action was brought for an injunction to restrain the enforcement of the provisions of the Willis-Campbell Act, which prohibited the brewing of intoxicating malt liquors and revoked the permits previously granted to the complainant for such purpose, because of the alleged unconstitutionality of the Act.

A motion for a preliminary injunction was made, but subsequent to the commencement of the action, the complaint was amended, and there was added as an additional party, David H. Blair, as Commissioner of Internal Revenue by consent.

The complainant then moved for a preliminary injunction upon the amended complaint and upon various affidavits of physicians which were thereupon served. At about the same time the defendants moved for dismissal of the bill of complaint on the various grounds set forth in the notice of motion to dismiss.

2 The defendants also filed affidavits of physicians in opposition to the motion and likewise extracts from the congressional record, and copies of certain sessions in the congressional record which are not printed in this record, but which by stipulation and order may be offered from the originals on file.

The motion for preliminary injunction was heard by Hon. Learned Hand, as well as the motion to dismiss on oral argument of counsel, and at the conclusion of the argument the learned District Judge denied the motion for preliminary injunction and granted the motion to dismiss.

An order for final judgment was thereupon made and final judgment thereafter entered dismissing the bill of complaint with costs against the complainant. The complainant appeals from the final decree in which there was involved the constitutionality of the Act of November 23, 1921, commonly known as the Willis-Campbell Act, and has duly filed the notice of appeal, which has been allowed, the bond, and assignment of errors which appear in the record. The learned District Judge who heard the respective motions, rendered no written opinion.

**Equity Subpoena.**

The President of the United States of America to Ralph A. Day, Federal Prohibition Director for the State of New York; Frank K. Bowers, Collector of Internal Revenue for the Second District of New York; William Hayward, U. S. Attorney, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by James Everard's Breweries, and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on each of you of two hundred and fifty dollars (\$250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 12th day of December, in the year One Thousand Nine Hundred and twenty-one, and of the Independence of the United States the One Hundred and Forty-six. Alexander Gilchrist, Jr., Clerk. Oleott, Bonyng, McManus & Ernst, Plaintiff's Sol'r, 170 Broadway.

The defendants required to file their answer or other defense in the above cause in the Clerk's Office of this Court on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso. (Sgd.) Alexander Gilchrist, Jr., Clerk. [Seal.]

4      United States District Court, Southern District of New York

[Title omitted.]

**Amended Bill of Complaint.**

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, sitting in equity:

The complainant, James Everard's Breweries, a corporation, brings this, its amended bill of complaint, against the above named defendants, and respectfully shows unto this Honorable Court as follows:

I. Complainant is a corporation organized and existing under the Laws of the State of New York, and has its principal place of business in the City and County of New York, in the said State.

II. Complainant is informed, and verily believes that Ralph A. Day is the duly qualified and acting Federal Prohibition Director for the State of New York, having under his jurisdiction also the supervision and regulation of the traffic in intoxicating liquors and bev-

erages in the Borough of Manhattan, City of New York, and that Frank K. Bowers is the duly qualified and acting Collector of Internal Revenue in and for the Second District of New York, embracing the jurisdiction of the Borough of Manhattan, County of New York, and City of New York, and that William Hayward is the duly appointed and acting United States Attorney in and for the Southern District of New York, and that David H. Blair is the duly appointed Commissioner of Internal Revenue of the United States.

III. Upon information and belief that said defendants are by law expressly charged with authority, power and duty to carry out the provisions of the various Acts of Congress, relative to the enforcement of the National Prohibition Laws and the regulations or decisions of the Commissioner of Internal Revenue within that portion of the City and State of New York, where complainant has its principal place of business, and carried on said business.

IV. This is a suit of a civil nature arising under the Constitution and Laws of the United States. The matter in controversy exceeds the sum or value of Three Thousand (\$3,000) Dollars in value, exclusive of interest and costs.

5 V. Complainant was incorporated in 1895, under the Laws of the State of New York, as a manufacturing corporation, for the purpose of carrying on and conducting the manufacture and brewing of lager beer, and other malt liquors, and of doing such other business as might be necessary for the operation of the business of such manufacture, and the sale of its products. It succeeded to the business heretofore conducted by James Everard who commenced the business of brewing lager beer and malt liquors in the City of New York in the year of 1885.

VI. Complainant further alleges that its place of business is on the block bounded by East 133rd Street and 134th Streets, between Madison and 5th Avenues, Borough of Manhattan, City and County of New York, and that the complainant there owns valuable parcels of real estate, having an approximate value of upwards of One Million (\$1,000,000) Dollars, and that it has a valuable brewing plant, consisting of brewing apparatus, machinery, wagons, trucks, stock on hand, fixtures and supplies, aggregating many thousands of dollars in value.

VII. That on or about the 29th day of January, 1919, there was enacted the Eighteenth Amendment to the Constitution of the United States, which prohibited the manufacture, sale or transportation of intoxicating liquors within the United States, including the importation and exportation thereof, and gave to the Congress of the United States, and the several States, concurrent power to enforce said article by appropriate legislation. A true copy of said amendment is hereto annexed as Exhibit A.

VIII. Complainant alleges that on the 28th day of October, 1919, the Congress of the United States passed over the veto of the President, an act entitled "An Act to Prohibit intoxicating beverages, and to regulate the manufacture, production, use and sale of high-proof spirits for other than beverage purposes, and to insure an ample

supply of alcohol and promote its use in scientific research and in the development of fuel, dye and other lawful industries." The said Act is popularly known as the Volstead Act, and its short title is the "National Prohibition Act." Said Act is now the law of the United States.

IX. The said "National Prohibition Act," among other things, in Title II thereof provides as follows:

*a.* "Sec. 1. When used in Title II and Title III of this Act (1) The word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt or fermented liquor, liquids, and compounds, whether medicated, proprietied, patented or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes."

*b.* "Sec. 3. No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized by this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

*c.* Section 3, second paragraph:

"Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the Commissioner may, upon application, issue permits therefor."

*d.* "Sec. 6. No one shall manufacture, sell, purchase, transport, or prescribe any liquor without first obtaining a permit from the Commissioner so to do, except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician as herein provided" \* \* \*

*e.* Sec. 6, second paragraph:

"No permit shall be issued to anyone to sell liquor at retail, unless the sale is to be made through a pharmacist designated in the permit and duly licensed under the laws of his State to compound and dispense medicine prescribed by a daily licensed physician. No one shall be given a permit to prescribe liquor unless he is a physician duly licensed to practice medicine and actively engaged in the practice of such profession."

*f.* "Sec. 7. No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless, after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a

medicine by such person is necessary and will afford relief to him from some known ailment."

g. That said Act designates and names the Commissioner of Internal Revenue as the officer charged with the authority, power and duty to make, draft and issue regulations in conformity with said Act for its proper enforcement, to issue permits therein provided for, and to designate, name and appoint assistants and agents to carry out said provisions, with powers, "Any act authorized to be done by the Commissioner may be performed by any assistant or agent designated by him for that purpose."

X. Complainant further alleges to the Court that, under said "National Prohibition Act," said Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury of the United States, drafted, promulgated and issued "Regulations 60 Relative to the Manufacture, sale, barter, transportation, importation, exportation, delivery, furnishing, purchase, possession, and use of Intoxicating Liquor under Title II of the National Prohibition Act of October 28th, 1919, providing for the enforcement of the Eighteenth Amendment to the Constitution of the United States," "Edition February 1, 1920."

7 XI. That said Regulations 60 among other things provide as follows:

A. Under I, "Definitions," Sec. 1, Subdivision (a);  
"The word 'Director' or the phrase 'Federal Prohibition Director' shall mean the person having charge of the administration of Federal prohibition in any State."

B. Article VIII thereof, entitled "Procedure for Procurement and delivery of intoxicating liquor by persons holding permits," among other things provides as follows:

"See. 54. Any person entitled to procure intoxicating liquor in accordance with these regulations must, in order to obtain such liquor, secure permit to purchase on Form 1410 from the Director, and no person is authorized to furnish or deliver intoxicating liquor except upon receipt of permit to purchase, unless otherwise specifically provided in these regulations.

"(a) Application for permit to purchase must be made on Form 1410, which when approved by the Director, becomes a permit. Directors will at any time furnish permit holders with supplies of such forms."

C. Said Regulations further provide "See. 55. Instructions for making application" that said permit holder shall designate thereon a description of intoxicating liquor desired, the quantity on hand, quantity desired, for what purpose desired and the name of vendor from whom to be purchased, and provides further for said "Director" to approve the same and thereby authorize the purchase and sale.

D. "See. 69. Use and Sale by Retail Druggists and Pharmacists," among other things, provides:

"(b) Alcoholic medicinal preparations, fit for use for beverage purposes, as are authorized to be manufactured by Article XI hereof, and other liquor may be sold by retail pharmacists, or by retail druggists where the sale is made through a pharmacist, upon physicians' prescriptions to persons who do not hold permits to sell or use intoxicating liquor and without the necessity of receiving permits to purchase, Form 1410, provided the name of the pharmacist (or druggist where the pharmacist is in his employ) appears on the prescription in the physician's handwriting in addition to all other data required by Article XIII."

E. Under subdivision (d) of Sec. 77, Article XIII, of said Regulations, entitled "Physicians Prescribing Intoxicating Liquor for Medicinal Purposes," it is provided as follows:

"(d) Blank prescriptions, Form 1403, are issued by the Commissioner in book form, serially numbered and may be procured free of cost by any physician holding a permit to prescribe intoxicating liquor from the Director. The Director should not issue more than one book of such prescription blanks to the same physician at one

time. However, a physician may procure a book of blanks  
8 when the blanks remaining in the book in his possession are  
not sufficient to cover his needs for a reasonable period in advance."

XII. Complainant further avers that the law officers of the United States, through the Attorney General of the United States, in an opinion rendered March 3, 1921, which opinion was given and rendered at the instance of the Secretary of the Treasury of the United States upon certain questions propounded, held in part as follows:

"1. Whether the Commissioner of Internal Revenue is authorized under the Volstead Act to issue a permit for the manufacture of whiskey for medicinal purposes.

"2. Whether the Commissioner of Internal Revenue is authorized under the Volstead Act to issue a permit for the manufacture of beer and other malt liquors, with an alcoholic content in excess of one-half of one per cent, for medicinal purposes.

"3. Whether the Commissioner of Internal Revenue is authorized under the Volstead Act to issue a permit for the manufacture of wine and other vinous liquors, with an alcoholic content in excess of one-half of one per cent for medicinal purposes.

"In answering the first three questions, it may be well to quote the language of my opinion of December 13, 1920, where in referring to Section 1, Title II, of the National Prohibition Act, I said: 'The word 'Liquors' is expressly defined in Section 1, above quoted to include whiskey and other liquors there enumerated.' In section 1, it is provided that the term 'Liquor' includes 'alcohol', brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor'. It will thus be seen that the liquors enumerated in your first three questions come within the definition of the term 'liquor'.

"It was not the purpose of Congress to prohibit the use of liquor for non-beverage purposes, as is evidenced by the wording of the Title of the National Prohibition Act."

And again: "The use of liquor as a medicine was recognized by Congress to be a nonbeverage use. This is shown by the provisions made for the issuance of permits to prescribe (see Section 7, Title II). I am, therefore, of opinion the Commissioner may issue permits for the manufacture of liquors for medicinal purposes."

And again: "The manufacture or sale of liquor for medicinal purposes has not been prohibited. The Constitutional amendment does not expressly confer power to prohibit either."

XIII. Complainant further avers that prior to rendering the opinion of the Attorney General of the United States, above referred to, the Commissioner, without authority or power, undertook to and did deny to various applicants the right of permit to manufacture and sell beer and malt liquors for medicinal purposes by restricting the definition of "liquor," and restricting the interpretation of said act to only spirituous and vinous liquor for medicinal purposes.

9        XIV. That on or about the 24th day of October, 1921, the Commissioner of Internal Revenue, amended the regulations, and especially #60 thereof, and issued a general order to the Federal Prohibition Directors, known as Treasury Department Order No. 3239, a true copy of which is hereto annexed as Exhibit B.

XV. Upon information and belief, that thereafter applications for permits were made by various brewers of malt liquor throughout the United States, and in the jurisdiction of the defendants herein, and an application was made on or about the 1st day of November, 1921, by this complainant, and on or about the 8th day of November, 1921, the complainant received a letter from the Federal Prohibition Commissioner, Washington, D. C., of which a true copy is hereto annexed as Exhibit C.

XVI. That thereafter and on or about the 15th day of November, 1921, after the application had duly been made, there were issued to this complainant, permits granting to the complainant the privilege of manufacturing intoxicating malt liquors, such as beer, ale, porter, etc., for medicinal purposes, and for bottling purposes. True copies of said permits are hereto annexed as Exhibits D and E.

XVII. That as a condition to the granting of such permits, the complainant was compelled to furnish a bond in the penal sum of twenty-five Thousand (\$25,000.) Dollars, and to incur the expense of procuring said bond, and to furnish said bond.

XVIII. That after the issuance of such permits complainant duly complied with all of the regulations required by the Collector of Internal Revenue for the Second District of New York, in respect to the payment of taxes on medicinal malt liquors.

XIX. That after the receipt of such permits (Complainant's Exhibits D and E) complainant made preparation for the manufacture of beer and other malt liquors for medicinal purposes, and invested large sums of money in their manufacture. Complainant also purchased supplies and paid miscellaneous items required by the rules

of the Internal Revenue Department, such as the cost of the bond, various stamps and certificates, and notarial expenses. Complainant also expended large sums for the purchase of supplies and additional apparatus, and at the time of the commencement of this action, had brewed a large stock of beer, ale and stout approximating 900 barrels, and had contracted for a large supply of malt, between the date of the receipt of said permits on or about November 15th, 1921, and November 23rd, 1921, when the Act Supplemental to the National Prohibition Act became effective.

XX. Complainant also avers that since the enactment of said Act Supplemental to the National Prohibition Act dated November 23rd, 1921, complainant had also received numerous inquiries from physicians and druggists, both wholesale and retail, for medicinal beer, and that it would be impossible to estimate the extent and demand for complainant's beer for medicinal purposes, as a large number of physicians and druggists had signified to complainant their desire to order beer for medicinal purposes.

10 XXI. Complainant further alleges that it has now on hand, and in its stock houses, large quantities of medicinal beer, unsold in containers and packages, put up as prescribed by law, and particularly by Treasury Department Regulation 3239, which it is unable to dispose of, because of the enactment of said Act supplemental to the National Prohibition Act. Complainant further avers that it has paid large sums of money for revenue taxes upon said medicinal beer, which outlay will be a total loss to complainant, if it is prevented from continuing the production and sale of beer for medicinal purposes.

XXII. Complainant further avers that it has expended large sums of money for material with which to manufacture medicinal beer, and that said material is now on hand. Complainant further avers that while a portion of said medicinal beer might be realcoholized, such process would entail a heavy loss to this complainant.

XXIII. Complainant further avers that it has, in all respects, complied with the laws and regulations of the State of New York, for the manufacture and sale of malt liquors, including beer, ale and stout for medicinal purposes in conformity with the laws of the United States, and rules and regulations thereof.

XXIII. A. Complainant also avers, upon information and belief, that after the promulgation of Treasury Decision 3239, the Federal Prohibition Director for the State of New York issued instructions to the pharmacists and physicians in his jurisdiction and made provision for the issuance of licenses and permits to such druggists and pharmacists.

XXIII. B. Complainant further respectfully avers that since the granting of the permits above specified and annexed to this bill of complaint as Exhibits D and E, its medicinal beer, ale and stout have become well known to physicians and pharmacists, and there are a great number of physicians who would, under proper rules and regulations, prescribe such medicinal beer for their patients, and a great number of pharmacists who would fill the prescriptions of such physicians.

XXIII. C. Upon information and belief, that various physicians have been prescribing beer, ale and stout for medicinal purposes, and such physicians have, in all respects, fully complied with all the laws of the State of New York, and of the United States, and rules and regulations thereunder, and that said physicians would continue to prescribe such malt liquors for medicinal purposes, unless interfered with and prevented by the defendant herein named.

11 XXIV. Complainant further avers that it has established a good and valuable business, and that its sales of its products of malt liquors for medicinal purposes have a large demand, which would result in a profitable business, if not interfered with, as herein set forth.

XXV. That on or about the 23rd day of November, 1921, there was enacted by the Congress of the United States, and approved by the President of the United States, an Act of Congress supplemental to the National Prohibition Act, a copy of which is hereto annexed as Exhibit F, which, among other things, provided as follows in Section 2 thereof:

"Sec. 2. That only spirituous and vinous liquor may be prescribed for medicinal purposes, and all permits to prescribe and prescriptions for any other liquor shall be void. No physician shall prescribe, nor shall any person sell or furnish on any prescription, any vinous liquor that contains more than 24 per centum of alcohol by volume, nor shall anyone prescribe or sell or furnish on any prescription more than one-fourth of one gallon of vinous liquor, or any such vinous or spirituous liquor that contains separately or in the aggregate more than one-half pint of alcohol, for use by any person within any period of ten days. No physician shall be furnished with more than one hundred prescription blanks for use in any period of ninety days, nor shall any physician issue more than that number of prescriptions within any such period unless on application therefor he shall make it clearly apparent to the commissioner that for some extraordinary reason a larger amount is necessary, whereupon the necessary additional blanks may be furnished him. But this provision shall not be construed to limit the sale of any article the manufacture of which is authorized under section 4, Title II, of the National Prohibition Act."

XXVI. Complainant further respectfully shows to the Court that the character and nature of its said business of manufacturing and selling intoxicating malt liquors for medicinal purposes, by virtue of the said laws, rules and regulations and its said permits hereinabove referred to, is such that in the conduct of its said business it can only sell and dispose of its said products by and through druggists and pharmacists having permits as hereinabove prescribed authorizing the purchase thereof, and upon said druggists and pharmacists being able to have their said applications to purchase, on said Form 1410, from complainant duly authorized and approved by said Federal Prohibition Director of the State of New York; and that complainant's said customers and prospective customers, said druggists and

pharmacists are unable to sell said products except upon duly authorized doctors' and physicians' prescriptions as hereinabove set forth. That as a result of the foregoing, any interference on the part of any or all of the within named defendants with the rights of said doctors and physicians in denying or attempting to deny or interfere with the right to prescribe complainant's malt liquors such as beer for medicinal purposes, or any interference, attempt or threatened interference, by refusing to approve permits to purchase on Form 1-410, of complainant's products, as herein above set forth under the laws, rules and regulations, is and would be a serious and direct interference and destruction of said complainant's business in manufacturing and selling its intoxicating malt liquors for medicinal purposes.

XXVII. Complainant further avers that the Federal Prohibition Director of the State of New York has refused to honor and authorize applications of druggists and pharmacists to produce said malt liquor, such as beer, ale and stout for medicinal purposes, and has refused, and still refuses to issue permits therefor, although said druggists and pharmacists have, in all respects, complied with all the laws of the State of New York and the United States, and all the rules and regulations issued thereunder. Upon information and belief, that said Director further threatens to revoke and cancel the permit of any and all physicians who prescribe or attempt to prescribe malt liquor, such as beer, ale and stout, for medicinal purposes.

XXVII-A. Complainant further avers that the Federal Prohibition Director of the State of New York has likewise refused to amend retail or "I" permits and wholesale or "B" permits for beer and intoxicating malt liquors for medicinal purposes, as authorized by instruction issued by the National Federal Prohibition Commissioner to the Federal Prohibition Directors for the various States, including the State of New York.

XXVIII. That by reason of the refusal of the Federal Prohibition Director for the State of New York to issue permits to pharmacists for beer and malt liquors for medicinal purposes, and the denial of the right of physicians to prescribe such malt liquors for such purposes, the complainant has been greatly and irreparably injured in its legal rights to its business and property.

XXIX. Complainant avers that the State of New York is sovereign in all matters relating to the health and welfare of its citizens and the police power of the State is to be exercised for the health and welfare of its said citizens, without interference from any governmental power of authority, unless such power is clearly and explicitly expressed in the Constitution of the United States.

XXX. Complainant further shows that there is no power or authority granted in the Constitution of the United States, or necessarily or properly implied in any of its provisions, or set forth in any amendment thereof, which authorized any officer of the United States, and more particularly the persons named herein as defendants, to interfere with the manufacture and sale by this complainant of malt liquors, when such manufacture or sale, or either, or both,

are carried on under lawful regulations of the United States, and the State of New York.

XXXI. The complainant further respectfully avers to the Court that the said Eighteenth Amendment in the simplest and most explicit language covers and includes only intoxicating liquors "for beverage purposes," and the Supreme Court of the United States has defined the application of said 18th Amendment and the interpretation thereof as relating to "The manufacture, sale, transportation, importation, and exportation of intoxicating liquors for beverage purposes," and law officers of the United States, including the Attorney General of the United States, and the Commissioner of Internal Revenue have acted upon such interpretation in their official conduct and relations with the execution and enforcement of laws enacted pursuant to the authority conferred under said 18th Amendment, as hereinbefore more specifically set forth. And complainant further respectfully shows to the Court that the Congress of the United States gave its sanction to said interpretation when the Act commonly called "The Volstead Act" (approved October 28th, 1919) was enacted with the following title, to wit, "An Act to prohibit intoxicating beverages, and to regulate the manufacture, production, use and sale of high-proof spirits for other than beverage purposes and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries."

XXXII. And the complainant further respectfully avers that nowhere in the said 18th Amendment is there any language or word giving to the Congress of the United States power and authority to prohibit the manufacture or sale, or the transportation, importation or exportation of intoxicating liquors for "medicinal purposes," and the Congress is without any power whatsoever under the Constitution to prohibit the use for medicinal purposes or the description for use for medicinal purposes of any form of intoxicating liquors.

And more specifically the complainant respectfully avers that the attempted enactment of the Act entitled "An Act Supplemental to the National Prohibition Act," approved November 23, 1921, in so far as it attempts to provide "that only spirituous and vinous liquor may be prescribed for medicinal purposes, and all permits to prescribe and prescriptions for any other liquor shall be void," is itself beyond the powers of the Congress of the United States, is without authority under the Constitution of the United States, and is wholly unconstitutional and void.

XXXIII. And the complainant further respectfully shows to the Court that the right to health and to be cured of ailments is one of the natural and inherent rights of man, recognized in all ages and by all peoples and governments; that "To heal all manner of sickness and all manner of disease" is and has always been not only one of the greatest privileges of man but one of the highest duties imposed upon him by religion ethics and morals, and this duty has been heretofore considered one of the most sacred objects of government, and has been encouraged and protected by the Constitution

and laws not only of the United States but of the several States, and especially by the State of New York. For the purpose of protecting the health of the people of the States, and especially of the State of New York, the laws have required that the persons handling and selling medicines and drugs must be specially educated and trained as pharmacists commonly known as "druggists" and that medicines and drugs should be prescribed only by persons educated and  
14 trained as physicians and surgeons, commonly known as "Doctors," but it has also been provided by law, and especially by the laws of New York, that when so educated and trained, and when duly licensed as such pharmacists or physicians, respectively, medicines and drugs, including medicines and drugs known to be noxious, poisonous, and dangerous to health and life if or when freely and carelessly used, have been and now are permitted to be prescribed, sold and distributed for the healing and cure of the sick and afflicted, under regulations provided by law for the prescription of the health and welfare of the people.

The complainant further respectfully shows to the Court that under the permits granted to the complainant to manufacture and sell beer and other malt liquors as set forth in this petition, the right so conferred upon complainant was limited and restricted to the manufacture for the purpose of selling, and to the selling, of such beer and malt liquors to the pharmacists as herein described for medicinal purposes and only upon prescriptions by physicians as herein described for medicinal purposes and was granted solely and wholly for the promotion of the health and welfare of the people of the State of New York and elsewhere who were sick and afflicted. And the complainant respectfully avers that in and by such permit there was conferred upon the complainant the right to carry on its business with and by and through the pharmacists, or "druggists" who had permits or could obtain permits to sell the products of the complainant's plant for medicinal purposes and with and by and through the physicians or "doctors" who had obtained or could obtain permits to prescribe such products for medicinal purposes.

XXXIV. Complainant further respectfully shows to this Court that in and by the said attempted enactment of the "Act Supplemental to the National Prohibition Act" approved November 23rd, 1921, the citizens of the State of New York, and the Citizens of the United States, whether resident of New York or elsewhere, were and are denied the natural right and privilege which is of incalculable and immeasurable value of selecting and using the persons who are to administer to their wants as physicians and druggists in time of sickness and trouble to themselves and their families, and the times and the conditions which are to be determined by the physicians and druggists, and their choice for such ministrations and treatment, including the privilege by such physicians to prescribe malt intoxicating liquors for medicinal purposes, if, in their judgment, such mode of prescription seems best, and if such physicians deem it proper in such time of sickness and trouble to prescribe for themselves and their families conscientiously, intoxicating malt

liquors, according to their knowledge and experience as physicians, and according to their science and practice of medicine.

And the complainant respectfully avers that such denial of such natural rights, not only deprives this complainant of substantial property rights, as herein set forth, but also deprives the citizens of New York, and of the United States, of those certain inalienable rights which were guaranteed by the Declaration of Independence, and among which are life, liberty, and the pursuit of happiness, to secure which rights governments are instituted among men, deriving their just powers from the consent of the governed.

Said Supplemental Act of November 23, 1921, also violates the spirit and purposes of the Preamble to the Constitution of the United States in that it does not promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.

Said Supplemental Act of November 23, 1921, is also in derogation of the rights of the complainant and of the people of New York under Amendment V to the Constitution of the United States in that it tends to deprive them of life, liberty and property without due process of law; and also of Amendment X of the Constitution of the United States in that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States restrictively, or to the people.

XXXV. The complainant further respectfully shows to the Court that said "Act Supplemental to the National Prohibition Act," approved November 23, 1921, is not only in itself repugnant to the Constitution of the United States, but also is, in and by, and by reason of such repugnance, an infringement of the powers of the State of New York and of the people and citizens of said State, including not only the complainant but also the pharmacists, the physicians, the sick and suffering and all other persons, because it prevents the interpretation and enforcement of rights and privileges to which they are entitled under the provisions of the Constitution of said State of New York, in which they reside and to the benefits of which Constitution of New York they are guaranteed as citizens of New York by Amendment XIV of the Constitution of the United States, in the first clause of which all such persons are specifically declared to be citizens not only of the United States but also "of the State in which they reside."

XXXVI. Complainant further avers that the defendants have publicly threatened to enforce the provisions of such Act of Congress passed November 23rd, 1921, supplemental to the National Prohibition Art, and to revoke the permits issued to the complainant, to prohibit complainant from continuing the manufacture of intoxicating malt liquors for medicinal purposes, and to institute civil and criminal proceedings, to enforce the same and will revoke the permits of pharmacists who may sell intoxicating malt liquors for medicinal purposes, and have forbidden pharmacists to make such sale, and have and will continue to revoke the permission granted to physicians to issue prescriptions for such purposes, and will refuse to issue prescription blanks to physicians for such purpose, and they are about

to take such steps as will prevent the complainant from disposing of its stock on hand, and continuing the manufacture of intoxicating malt liquors for medicinal purposes, in accordance with regulations previously enacted, and are about to institute civil and criminal proceedings, to enforce the said Act of November 23rd, 1921.

Complainant further avers, upon information and belief, that it is likely that the defendant, Day, as Federal Prohibition Director for the State of New York will cause an order to be issued to this complainant, to destroy its stock of tax-paid medicinal beer now on hand.

16 XXXVII. Complainant further avers that if the defendants, their agents, and servants, and those acting under them are permitted to do the things that have been done, and are threatened, as above recited, to said pharmacists and physicians, and to this complainant, the complainant will suffer great and irreparable injury and damage.

XXXVIII. Complainant further alleges that such attempted prosecutions, proceedings, and suits in said Acts of Congress purported to be authorized and required, and about to be taken by the defendants, their agents and servants, under the provisions of the National Prohibition Act, and supplemental acts, to enforce said acts, will involve this complainant in a multiplicity of legal proceedings, civil and criminal, and will cause irreparable injury to its business in a measure not capable of being measured and adjudicated in an action at law, and complainant has no adequate remedy at law.

XXXIX. Complainant further alleges and avers that the defendants herein are not either jointly or severally possessed of sufficient means to satisfy any judgment against them for the large and substantial damages, which would accrue to the complainant, if the defendants or any of them, enforced the provisions of such Acts of Congress, and if this Honorable Court did not restrain and enjoin said defendants from interfering with the complainant's business and property as aforesaid.

XL. Complainant prays that the Court, by its decree, declare unconstitutional the Acts of Congress signed by the President on the 23rd day of November, 1921, described as "An Act supplemental to the National Prohibition Act."

XLI. Deponent further prays that a temporary injunction issue and other appropriate relief be granted to the complainant prohibiting and restraining, during the pendency of this action, the defendants and their officers, agents, servants and employees, from attempting to interfere, or in any manner interfering with permitting pharmacists to purchase and sell intoxicating malt liquors for medicinal purposes, and with any and all physicians who hold permits from the United States, and who prescribe for their patients under the rules and regulations of the United States and of the State of New York, intoxicating malt liquors for medicinal purposes, and from interfering, in any manner, whatsoever, with the property business, or affairs of the complainant, in the manufacture of, and sale of intoxicating malt liquors for medicinal purposes, to permitte-

pharmacists, as aforesaid, for sale by said pharmacists on the new prescription of aforesaid physicians.

XLII. And complainant respectfully prays further that an injunction issue specifically against the defendant, Ralph A. Day as Federal Prohibition Director of New York, enjoining and restraining him, as such Director, from enforcing the terms and provisions of the Act, supplemental to the National Prohibition Act, approved November 23rd, 1921, by declining or refusing to approve any further applications for permits by druggists and physicians respectively, for the right to purchase and sell, and the right to prescribe intoxicating malt liquors brewed for medicinal purposes, and from interfering with complainant's manufacture of intoxicating malt liquors and their sale for medicinal purposes to permittee-druggists.

Complainant further respectfully prays that the said Ralph A. Day, as Federal Prohibition Director of the State of New York, be enjoined and restrained from refusing to amend retail or "I" permits and wholesale or "B" permits, hitherto issued to druggists, to include the right to purchase and sell intoxicating malt liquors for medicinal purposes, as provided for in the aforesaid instructions to the State Prohibition Directors issued by the National Prohibition Commissioner.

XLIII. Complainant further prays that the restraining order and preliminary injunction which may be granted herein, pending the final hearing and decision of this cause, whereby the said defendants, their agents, servants, subordinates and employees be enjoined and restrained may, upon final hearing, be made perpetual.

Wherefore, complainant prays that a writ of subpoena issued herein directed to the above-named defendants, and each of them commanding them on a day certain to appear and answer this bill of complaint. James Everard's Breweries, by Robert Hilliard, Complainant, President. Oleott, Bonygne, McManus & Ernst, Solicitors for the Complainant, 170 Broadway, Borough of Manhattan, New York City.

### **Exhibit A to Amended Bill.**

#### *Eighteenth Amendment to the Constitution (Prohibition of Intoxicating Liquors).*

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction hereof for beverage purposes is hereby prohibited.

"See. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

"See. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

And, further, that it appears from official documents on file in this Department that the Amendment to the Constitution of the United States proposed as aforesaid has been ratified by the Legislatures of the States of Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, South Carolina, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

And, further, that the States whose Legislatures have so ratified the said proposed Amendment, constitutes three-fourths of the whole number of States in the United States.

**Exhibit B to Amended Bill.**

[T. D. 3239.]

Medicinal Use of Malt Liquors and Wines—Labeling of Liquor of All Kinds Sold on Prescription—Regulations No. 60 Amended.

Treasury Department,  
Office of Commissioner of Internal Revenue,  
Washington, D. C.

To Federal Prohibition Directors and others concerned:

Regulations No. 60, issued pursuant to the national prohibition act, are hereby amended to cover the manufacture and sale of intoxicating malt liquors for medicinal purposes as follows:

Article II, section 2, is amended by inserting a new subdivision to be designated as subdivision "(g)," providing as follows:

(g) Intoxicating malt liquors such as beer, ale, porter, malt extracts, and similar fermented malt liquors containing one-half of one per centum or more of alcohol by volume manufactured as provided by Article IV for medicinal purposes.

Article IV is amended by substituting the heading "Manufacture of distilled spirits, wines, and malt liquors," and by adding to such article a new section to be designated "Section 33½" providing as follows:

Sec. 33½. Intoxicating malt liquors such as beer, ale, porter, malt extracts, and similar fermented malt liquors containing one-half of one per centum or more of alcohol by volume may be manufactured for medicinal purposes but only by a duly qualified brewer on brewery premises. In addition to qualifying, keeping records, making returns, and otherwise complying with internal-revenue laws and Regulations 6, revision 1918, heretofore issued such brewer before engaging in the business of manufacturing malt liquors must make application, Form 1404, and obtain permit to manufacture, Form 1405, as provided by Article III hereof. Such permit, however, shall

not be delivered until bond, Form 20, has been filed with and approved by the collector of internal revenue as provided by Regulations 6, which bond will be accepted in lieu of bond, Form 1408 or Form 1409. The proprietor of a dealeoholizing plant, industrial alcohol plant, or vinegar factory using the vaporizing process who is a manufacturer of cereal beverages or beverages containing less than one-half or one per centum of alcohol may not under such qualifications or permit manufacture intoxicating malt liquors for medicinal purposes. A duly qualified brewer obtaining permit as aforesaid may manufacture intoxicating malt liquors for sale for medicinal purposes and for transfer from the brewery premises either to a contiguous industrial alcohol plant for use as distilling material or to a dealeoholizing plant as provided by Article VI. The dealcoholizing or distilling of intoxicating malt liquors cannot be done on the premises described in the brewer's notice as the brewery

premises. Industrial alcohol plants and dealeoholizing plants  
20 must be completely separated from the brewery premises, and if under the same roof such establishments or plant must be separated by a solid partition as provided by Regulations 6 as aforesaid. The removal of intoxicating malt liquors from the brewery premises to a contiguous industrial alcohol plant or dealcoholizing plant shall be in accordance with the provisions of Regulations 6, pages 34-36, inclusive, the quantity of liquors thus removed to be determined as therein provided and the necessary records kept as required by these regulations. Where the industrial alcohol plant, the dealcoholizing plant, and the brewery are operated by the same person, no permit to purchase, Form 1410a, covering such removals will be required unless transportation by carrier is involved.

(a) Liquids containing less than one-half of one per centum of alcohol by volume produced at industrial alcohol plants or dealcoholizing plants operated by the brewer may be returned to the brewery premises for manipulation by cooling, flavoring, carbonating, settling, and filtering in order to place same in a marketable condition as cereal beverages. The dealcoholized liquids thus returned to the brewery premises for manipulation must at all times be kept separate and distinct from the intoxicating malt liquors manufactured for medicinal purposes and in tanks, vats, or other containers designated and set apart exclusively for such purpose. When the process of manipulation is completed and the cereal beverage drawn off into kegs, barrels, or other bulk containers, such containers shall be immediately labeled as provided by Article VI of these regulations and T. D. 3084, and promptly removed from the place or places where intoxicating malt liquors are kept or in process of manufacture and stored in some separate room or building set aside and used exclusively for that purpose or removed entirely from the brewery premises.

(b) Intoxicating malt liquors may be sold by the brewer only in bottles and closed cases. Such liquors may not be bottled on brewery premises but must be bottled in brewer's bottling house as provided by Regulations 6. The brewer must make application, Form 1404,

furnish bond, Form 1408 or 1409, and procure permit, Form 1465, covering such bottling house. The application must fully describe such bottling house and any rooms or buildings used in connection therewith in which such liquors are stored pending sale or shipment. No permit to purchase, Form 1410a, will be required covering the removal of such liquors from the brewery premises to such bottling house unless transportation by carrier is involved. No intoxicating liquors can be purchased, procured, or received by the brewer under the permit covering the bottling plant other than the intoxicating malt liquors produced on the brewery premises. Record 52 need not be kept by the brewer covering transactions at the bottling house, but supplementary record 52 covering receipts and sales of intoxicating malt liquors shall be kept and transcripts forwarded to the director not later than the tenth of each month showing transactions during the preceding month. This record must be procured by the brewer at his own expense, but transcripts thereof may be obtained from the director. Sales of intoxicating malt liquors at such 21 bottling house will involve the brewer in special tax liability as a wholesale dealer in malt liquors under section 324, Revised Statutes, as amended.

(c) Intoxicating malt liquors manufactured on the brewery premises for sale for medicinal purposes and cereal beverages returned thereto for manipulation as above may be removed or conveyed by pipe line or otherwise to the bottling house for bottling, provided the removal and bottling of such liquors and beverages shall not be carried on at the same time and shall be under the supervision of a deputy or other officer designated and appointed for such purpose. Intoxicating malt liquors and cereal beverages shall not be allowed in the bottling room of the bottling house at the same time, and when such intoxicating malt liquors and cereal beverages have been bottled they shall be immediately removed from the bottling room of the bottling house at the same time, and when such intoxicating malt liquors and cereal beverages have been bottled they shall be immediately removed from the bottling room and kept in separate places of storage provided exclusively for such purpose. Intoxicating malt liquors shall at all times be kept on the premises designated in the permit covering the bottling house until removed pursuant to permit to purchase. Tax provided by section 608, revenue act of 1918, is due and payable on intoxicating malt liquors manufactured, removed, and sold under these regulations, and such tax shall be collected and paid in accordance with the provisions of Regulations 6.

(d) Any malt extracts containing one-half of one per cent or more of alcohol by volume, regardless of the quantity of extractive matter therein derived from malt, are held to be intoxicating liquors within the purview of the national prohibition act and regulations issued pursuant thereto. Any malt extract intended to be sold to the general public without prescription must contain less than one-half of one per cent of alcohol by volume and must be manufactured, tax paid, and sold in the same manner as other cereal beverages.

(e) The following label shall be placed on the bottle containing intoxicating malt liquors as soon as such liquors are bottled:

- (1) Name and address of the manufacturer.
- (2) Symbol and serial number of the permit covering the brewery premises.
- (3) Date of manufacture. (Date when removed from the brewery premises.)
- (4) Kind of intoxicating liquor contained in package, such as "beer," "ale," "porter," etc.
- (5) Quantity in wine gallons and the alcoholic content.
- 22 (6) The following statement: "For medicinal purposes only. Sale or use for other purposes will cause heavy penalties to be inflicted."

Such label shall also be placed on each case containing such bottled liquors before the cases are removed to the place of storage. Before the case containing such liquors are removed, sold, shipped, or delivered the following additional label shall be placed thereon, or the information required thereby may be included in the label above:

- (1) Name of Manufacturer.
- (2) Kind, quantity in wine gallons, and alcoholic content.
- (3) Date of sale.
- (4) Name, address of consignor, and number of permit covering bottling house.
- (5) Name, address, and permit number of consignee.

Each bottle and case of cereal beverages bottled in the brewer's bottling house as herein provided must bear a label conforming to the requirements of Article VI, Regulations 60, as amended by T. D. 3084. These labels must be affixed immediately, upon bottling and casing the beverage. The labels above relating to intoxicating malt liquors are subject to all requirements of Article XVIII.

Article XII, section 69, subdivisions (b) and (c), as amended, are hereby further amended as follows:

(b) Alcoholic medicinal preparations fit for use for beverages purposes authorized to be manufactured by Article XI hereof, and other intoxicating liquors may be sold without a permit to purchase, Form 1410a, by a retail druggist who is a pharmacist duly licensed under the laws of his State to compound and dispense medicine or by a retail druggist through a pharmacist licensed as aforesaid, upon a physician's prescription, provided the data required by Article XII, including the name of the retail druggist, appears on the prescription in the physician's handwriting. A pharmacist is not permitted to refill any such prescription. Such pharmacist should refuse to fill any prescriptions for liquor if he has reason to believe that physicians are prescribing for other than medicinal uses or that a patient is securing through one or more physicians quantities of intoxicating liquor in excess of the amount necessary for medicinal purposes. No prescription shall be filled calling for a greater quantity of liquor than that authorized by these regulations and a pharmacist should refuse to fill any such prescription. Physicians may not prescribe liquor for their own personal use.

In every case where intoxicating liquor is sold on a physician's prescription, there must be affixed to the container thereof a label showing the following:

23      (1) Serial number of prescription (to be taken from the prescription blank).  
(2) Name and address of the rental druggist.  
(3) Name of the patient.  
(4) Name of physician.  
(5) Kind and quantity of intoxicating liquor and proof, if liquor is spirituous.  
(6) Date prescription is filled.  
(7) Directions for use.

Where bottles are removed from the case and packed or wrapped in a carton or other package, it will be sufficient to affix the label to the outside of such package.

(c) Every pharmacist filling a prescription for intoxicating liquor must, at the time of filling the same, indorse thereon over his signature the word "Cancelled," together with the date the liquor was delivered. A retail druggist must preserve in a separate carefully guarded file each prescription so filled.

Article XIII, section 77, and subdivisions (a) and (b) thereof are amended as follows:

See. 77. A physician who has filed application, Form 1404, and obtained permit to prescribe intoxicating liquor, as provided in Article III, may prescribe distilled spirits, wines, malt liquors, or such alcoholic medicinal preparations which are fit for use for beverage purposes as are authorized to be manufactured by section 60, for a person upon whom he is in attendance, if, after careful physical examination of such person, or in case in which such examination is impracticable, upon the best information obtainable, the physician believes that the internal or external use of such liquor as a medicine by such person is necessary and will afford relief to him from some known ailment. A physician who does not hold a permit to prescribe may not issue prescriptions for intoxicating liquors.

(a) No prescription may be issued for a greater quantity of intoxicating liquor than is necessary for use as a medicine by the person for whom prescribed in the treatment of an ailment from which such patient is known by the physician to be suffering. Not more than a pint of spirituous (distilled) liquor is administered to any person by any physician or physicians, as provided in section 71, the aggregate quantity so administered and the quantity prescribed for such person may not exceed one pint within any period of ten days. Not more than a pint of alcohol for external use may be prescribed for the same patient at one time. Not more than two

24      quarts of wine or two and one-half gallons of intoxicating malt liquors, to be taken internally, shall be prescribed at one time for use by the same person. Separate prescriptions shall be used for spirituous liquors, wines, and malt liquors. Physicians are not permitted to write prescriptions for intoxicating liquors for their own use, or to use any liquor procured upon prescriptions

issued by them. Intoxicating liquors procured upon prescriptions may only be used for medicinal purposes by the person for whom prescribed and may not be sold or otherwise disposed of by them.

(b) Prescriptions for intoxicating liquor may only be filled by a licensed pharmacist who is also a retail druggist, or by a licensed pharmacist in the employ of a retail druggist. A pharmacist employed by any person other than a retail druggist may not fill prescriptions for intoxicating liquors. No prescription may be filled more than once. D. H. Blair, Commissioner of Internal Revenue.

Approved October 24, 1921: A. W. Mellon, Secretary of the Treasury.

25

**Exhibit C to Amended Bill.**

Treasury Department,  
Bureau of Internal Revenue,  
Washington.

Office of Federal Prohibition Commissioner.

Pro. Counsel OVE.

James Everard's Breweries, 12 East 133rd St., New York, N. Y.

GENTLEMEN: Representatives of your brewery have visited this office and made inquiry in regard to the production of cereal beverages, by checked fermentation, on the premises of a brewery, concurrently with the production of malt liquor for medicinal purposes. Inquiry is also made as to whether or not old beer labels now on hand may be used, although not rectangular in shape, provided they contain the exact data prescribed in Treasury Decision 3239.

In regard to this matter, you are informed that if the entire industrial alcohol plant, or dealeoholizing plant, is converted into a brewery, by giving the brewer's notice on Form 27-c and bond on Form 20, through the collector of internal revenue, and two permits are procured through the Federal Prohibition Director, covering the brewery premises and the bottling house, credit may be taken on the records of the industrial alcohol plant, or dealcoholizing plant, as the case may be provided the dealcoholizing or distilling is to be completely abandoned, and the beer thus transferred to the brewery premises may be debited on the brewer's record 104. In such case, the brewer's monthly return, Form 18, should show the quantity of beer transferred and a red ink notation should be made thereon showing the source of the beer.

After qualifying as above indicated, and transferring the malt liquor, such liquor may be sold to duly qualified permittees for medicinal purposes, and be shipped pursuant to permits to purchase Form 1410-A. There must be strict compliance with the requirements of the provisions of Treasury Decision 3239, in all other respects as well as Regulations 6.

In case the brewery is thus established, and it is desired to manufacture both medicinal malt liquor and cereal beverages, by checked fermentation, the same may be accomplished in the following manner: The mashing and brewing may be done concurrently, but the wort to be converted into cereal beverages, by checked fermentation, must be set aside and kept separate throughout the various processes of manufacture until completed, and no part of

26 the wort may be mixed with the fermented malt liquor for the purpose of attenuating it, and wort for conversion into cereal beverages may not be *kreuzened* with fermented malt liquor. It will also be distinctly understood that no portion of the wort thus set aside for conversion into cereal beverages may at any time, during the processes of manufacture, contain as much as one-half of one per cent of alcohol by volume.

The old labels for beverage malt liquor which you now have on hand may be used on medicinal malt liquor, provided they contain all the data prescribed in T. D. 3239, although the shape thereof is not rectangular, as provided by said Treasury Decision. This permission is granted on the condition that no more labels are printed or used which do not conform to the requirements of the regulations as to the shape thereof.

A brewer thus qualified for the purpose of producing concurrently medicinal malt liquor and cereal beverages, by checked fermentation, on the brewery premises may not dealecoholize and waste the alcohol, or distill and save the alcohol on such brewery premises. If there be any stills or dealecoholizing apparatus on the premises when thus converted into a brewery, this office will not at this time insist upon removal of the apparatus, provided the use thereof for the purpose for which intended is effectually prevented by attachment of Government locks, or partial dismantling to accomplish the purpose.

Copies of this letter will be furnished the Collector of Internal Revenue for your District and the Federal Prohibition Director of your State. Respectfully, R. A. Haynes, Prohibition Commission Rec.

27

**Exhibit D to Amended Bill.**

Serial No. N. Y. -A.-97.

Treasury Department,

United States Internal Revenue.

*Permit Issued under the National Prohibition Act and Regulation  
Issued Thereunder.*

Penal sum of bond \$25,000.00.

Dated 11/2/21.

36-23441.

Office of Federal Prohibition Commissioner,  
Washington, D. C.

To James Everard's Breweries, Inc., Dan'l M. Tracy, 6-12 East 134th  
St., New York, New York:

Applications having been duly presented and approved, you are hereby authorized and permitted to receive intoxicating malt liquors, such as beer, ale, porter, malt extracts and similar fermented malt liquors, containing one-half of one percent or more of alcohol, for bottling purposes, in accordance with Treasury Decision 3239.

All liquors must be manufactured by the brewery operating under permit bearing serial No. N.Y.)-A-98.

This permit is effective from the date hereof, and will remain in force until December 31, 1922, unless revoked or renewed as provided by law or regulations.

This permit is granted under the conditions that the provisions of National Prohibition Act and Regulations issued thereunder will be strictly observed.

Dated this November 15, 1921. James E. Jones, Acting Prohibition Commissioner."

28

**Exhibit E to Amended Bill.**

(Copy.)

Serial No. N.Y.A-98.

"Treasury Department,  
United States Internal Revenue.

*Permit Issued under the National Prohibition Act and Regulations  
Issued Thereunder.*

Penal sum of bond \$25,000.00.

Dated 11/2/21.

36-23441.

Office of Federal Prohibition Commissioner,  
Washington, D. C.

To James Everard's Breweries, Inc., Daniel M. Tracy, 10-28 East 133rd St. and 7-15 East 132nd St., New York, New York:

Application having been duly presented and approved, you are hereby authorized and permitted to manufacture intoxicating malt liquors, such as beer, ale, porter, malt liquors to wit: In accordance

with Regulations 6 and 60, Article IV, Section 33½ and Treasury Decision 3239.

All intoxicating liquors manufactured under this permit are for sale only in bottles and closed cases for medicinal purposes and cannot be sold except as prescribed in Treasury Decision 3239.

This permit is effective from the date hereof, and will remain in force until December 31, 1922, unless revoked or renewed as provided by law or regulations.

This permit is granted under the conditions that the provisions of National Prohibition Act and Regulations issued thereunder will be strictly observed.

Dated this November 15, 1921. James E. Jones, Acting Prohibition Commr."

29

### Exhibit F to Amended Bill.

(68th Congress.—H. R. 7294.)

#### *An Act Supplemental to the National Prohibition Act.*

Sec. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the words "person," "commissioner," "application," "permit," "regulation," and "liquor," and the phrase "intoxicating liquor," when used in this Act, shall have the same meaning as they have in Title II of the National Prohibition Act.

Sec. 2. That only spirituous and vinous liquor may be prescribed for medicinal purposes, and all permits to prescribe and prescriptions for any other liquor shall be void. No physician shall prescribe, nor shall any person sell or furnish on any prescription, any vinous liquor that contains more than 24 per centum of alcohol by volume, nor shall any physician issue more than that number of prescriptions than one-fourth of one gallon of vinous liquor, or any such vinous or spirituous liquor that contains separately or in the aggregate more than one-half pint of alcohol, for use by any person within any period of ten days. No physician shall be furnished with more than one hundred prescription blanks for use in any period of ninety days, nor shall anyone prescribe or sell or furnish on any prescription more within any such period unless on application therefor he shall make it clearly apparent to the commissioner that for some extraordinary reason a larger amount is necessary, whereupon the necessary additional blanks may be furnished him. But this provision shall not be construed to limit the sale of any article the manufacture of which is authorized under section 4, Title II, of the National Prohibition Act.

If the commission shall find after hearing, upon notice as required in section 5, Title II, of the National Prohibition Act, that any article enumerated in subdivisions *b*, *c*, *d*, or *e* of section 4 of Title II of said National Prohibition Act is being used as a beverage, or for intoxicating beverage purposes, he may require a change of formula of such article and in the event that such change is not made within a time to be named by the commissioner he may cancel the permit for the

manufacture of such article unless it is made clearly to appear to the commissioner that such use can only occur in rare and exceptional instances, but such action of the commissioner may by appropriate proceedings in a court of equity be reviewed, as provided for in section 5, Title II, of said National Prohibition Act; Provided, That no change of formula shall be required and no permit to manufacture any article under subdivision (e), Section 4, Title II, of the National Prohibition Act shall be revoked unless the sale or use of such article is substantially increased in the community by reason of its use as a ~~beverage~~ or for intoxicating beverage purposes.

No spirituous liquor shall be imported into the United States, nor shall any permit be granted authorizing the manufacture of any spirituous liquor, save alcohol, until the amount of such liquor now in distilleries or other bonded warehouses shall have been reduced to a quantity that in the opinion of the commissioner will, with liquor that may thereafter be manufactured and imported, be sufficient to supply the current need thereafter for all non-beverage uses; Provided That no vinous liquor shall be imported into the United States unless it is made to appear to the commissioner that vinous liquor for such non-beverage use produced in the United States is not sufficient to meet such nonbeverage needs; Provided further, That this provision against importation shall not apply to shipments en route to the United States at the time of the passage of this Act; And provided further, That the commissioner may authorize the return to the United States under such regulations and conditions as he may prescribe any distilled spirits of American production exported free of tax and reimported in original packages in which exported and consigned for redeposit in the distillery bonded warehouse from which originally removed.

Sec. 3. That this Act and the National Prohibition Act shall apply not only to the United States but to all territory subject to its jurisdiction, including the Territory of Hawaii and the Virgin Islands; and jurisdiction is conferred on the courts of the Territory of Hawaii and the Virgin Islands to enforce this Act and the National Prohibition Act in such territory and islands.

Sec. 4. That regulations may be made by the commissioner to carry into effect the provisions of this Act. Any person who violates any of the provisions of this Act shall be subject to the penalties provided for in the National Prohibition Act.

Sec. 5. That all laws in regard to the manufacture and taxation of any traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provision of the National Prohibition Act or of this Act; but if any act is a violation of any of such laws and also of the National Prohibition Act or of this Act, a conviction for such act or offense under one shall be a bar to prosecution therefor under the other. All taxes and tax penalties provided for in section 35 of Title II of the National Prohibition Act shall be assessed and collected in

the same manner and by the same procedure as other taxes on the manufacture of or traffic in liquor.

If distilled spirits upon which the internal-revenue tax has not been paid are lost by theft, accidental fire, or other casualty while in possession of a common carrier subject to the Transportation Act of 1920 or the Merchant Marine Act, 1920, or if lost by theft from a distillery or other bonded warehouse, and shall be made to appear to the commissioner that such losses did not occur as a result of negligence, connivance, collusion, or fraud on the part of the owner or person legally accountable for such distilled spirits, no tax shall be assessed or collected upon the distilled spirits so lost, nor shall any tax penalty be imposed or collected by reason of such loss, but the exemption

from the tax and penalty shall only be allowed to the extent that the claimant is not indemnified against or recompensed for such loss. This provision shall apply to any claim for taxes or tax penalties that may have accrued since the passage of the National Prohibition Act or that may accrue hereafter. Nothing in this section shall be construed as in any manner limiting or restricting the provisions of Title III of the National Prohibition Act.

Sec. 6. That any officer, agent, or employee of the United States engaged in the enforcement of this Act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwellings, without a warrant directing such search, or who while so engaged shall without a search warrant maliciously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor and upon conviction thereof shall be fined for a first offense not more than \$1,000, and for a subsequent offense not more than \$1,000 or imprisonment not more than one year, or both such fine and imprisonment.

Whoever not being an officer, agent, or employee of the United States shall falsely represent himself to be such officer, agent, or employee and in such assumed character shall arrest or detain any person, or shall in any manner search the person, buildings, or other property of any person, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than \$1,000 or imprisoned for not more than one year, or by both such fine and imprisonment.

UNITED STATES OF AMERICA,  
*State and County of New York, ss:*

Robert Hilliard, being first duly sworn, deposes and says:

I am the President of James Everard's Breweries, the complainant corporation above named, I have read the foregoing amended bill of complaint, and know the contents thereof, and the same is true of my own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters, I believe it to be true. Robert Hilliard.

Subscribed and sworn to before me this 24<sup>th</sup> day of January, 1922. Nathan Ballin, Notary Public, Kings County. Certificate filed N. Y. and Bronx Counties. Kings Co. Clerk's No. 83, Regist-r'- No. 2068. N. Y. Co. Clerk's No. 92, Register's No. 2029. Bronx Co. Clerk's No. 1, Register's No. 2201. Commission expires March 30, 1922.

33 [File endorsement omitted.]

34 At a Stated Term of the U. S. District Court of the Southern District of New York Held at the Court-house, in the Federal Building, on the 25th Day of January, 1922.

Present: Honorable Julian W. Mack, Judge.

[Title omitted.]

#### **Order Amending Amended Bill.**

Upon reading and filing the annexed stipulation for the amendment of the title of this action by striking out the "H" in the name of William H. Hayward, and by adding as a party defendant, David H. Blair, as Commissioner of Internal Revenue, it is

Ordered, that the amended complaint to be filed shall contain such correction and addition, and that all further papers in this action may contain the title so corrected and amended accordingly. Julian W. Mack, U. S. C. J.

35 United States District Court, Southern District of New York.

[Title omitted.]

#### **Stipulation for Addition of David H. Blair as Party Defendant.**

It is hereby stipulated and consented that there shall be added as a fourth defendant to this action, David H. Blair as Commissioner of Internal Revenue, and that an order be drawn by the Complainant's solicitors consenting that said additional defendant be added in the amended complaint, and that authority will be requested by the United States Attorney to appear for him, a consent to the entry of said order to be annexed thereto.

It is further consented that the Complainant may serve duplicates of such affidavits of physicians as Complainant may select as part of the papers to be served on the new motion for injunction to be made herein, entitled in this action, said duplicates being copies of original affidavits filed in the United States District Court, Eastern District of New York, in the case of Piel Brothers against Day and others, without the necessity for the re-verification of such affidavits, and that such duplicates entitled in this action shall be regarded with the same force and effect as if the same were re-verified herein, and that either side may use in the temporary injunction any parts of the Congressional Record of the testimony before the Committee of

Congress as though the statements contained were in affidavit form. (Sgd.) Oleott, Bonynge, McManus & Ernst, Solicitors for the Complainant. (Sgd.) William Hayward, U. S. Attorneys, Solicitor for the Defendants.

**O. K. J. H. C.**

36      United States District Court, Southern District of New York

[Title omitted.]

**Motion to Dismiss.**

Ralph A. Day, Federal Prohibition Director for the State of New York; Frank K. Bowers, Collector of Internal Revenue for the Second District of New York; William Hayward U. S. Attorney for the Southern District of New York, and David H. Blair, as Commissioner of Internal Revenue, named as defendants in the above entitled action and sued herein, in their respective official capacities as above set forth, move that the bill of complaint and divers petitions thereof be dismissed and assign the following grounds for this motion; namely,

First. The bill of complaint does not present a cause of action in equity under the Constitution of the United States.

Second. The bill of complaint does not disclose a cause of action equitable in its nature, civil in its character and arising under the Constitution of the United States.

Third. The facts alleged in the bill of complaint are insufficient to constitute a valid cause of action in equity.

Fourth. It appears from the bill of complaint that the complainant has a plain, adequate and complete remedy at law.

Wherefore, these defendants say that they should not be held to answer to the bill of complaint or to the several allegations  
 37      thereof above referred to, but that said bill should be dismissed and said several allegations should be stricken therefrom, with costs to these defendants. William Hayward, U. S. Attorney for the Southern District of N. Y. — — —, Solicitor pro se and for Defendants Day and Bowers.

38      United States District Court, Southern District of New York

[Title omitted.]

**Notice of Motion for Preliminary Injunction.**

SIRS: Please take notice that upon the amended bill of complaint duly filed herein, and upon the various affidavits of physicians, copies of which will be served upon the United States Attorney prior to the argument of the motion herein, the right to serve which is expressly reserved, we shall move this Honorable Court at a Stated Term thereof

for the hearing of motions, to be held in the Federal Building, Borough of Manhattan, City of New York, on the 3rd day of February, 1922, at 10 A. M., or as soon thereafter as counsel can be heard for an order granting a preliminary injunction pending the hearing and determination of this action, as prayed for in the amended bill of complaint, and for such other and further relief as to this Court may seem just and proper in the premises.

Dated, New York, January 30th, 1922. Olcott, Bonynge, Manus & Ernst, Solicitors for the Complainant, 170 Broadway, Borough of Manhattan, New York City.

To: Ralph A. Day, Federal Prohibition Director for the State of New York; Frank K. Bowers, Collector of Internal Revenue for the Second District of New York; William Hayward, United States Attorney; David H. Blair, as Commissioner of Internal Revenue.

39 [Title omitted.]

40 United States District Court, Southern District of New York.

[Title omitted.]

**Affidavit of Bryan De Forrest Sheedy.**

STATE OF NEW YORK,  
*City of New York,*  
*County of New York, ss:*

Bryan De Forrest Sheedy being duly sworn, deposes and says: I reside at 170 West 73rd Street, New York City, New York. I graduated from the New York University Medical College in the year 1885 and became a licensed practitioner of the State of New York in the same year and have practiced general or special medicine until the present time. For upward of fifteen years I was engaged in the general practice of medicine and for the last twenty years of my professional career have specialized in ear, nose and throat work, for which specialty I qualified in the clinics of Vienna, Berlin and London. I was an instructor at the New York Post Graduate Medical School and Hospital, Second Avenue and Twentieth Street, in the City of New York, for more than twenty-five years and for several years a Professor of nose and throat diseases in the Fordham Medical College, and during all this time did regular Hospital work.

In the course of my practice I have had frequent occasion to prescribe and recommend spirituous, vinous and fermented liquors to my patients, but have far greater use of malt tonics and beer, containing a small per cent of alcohol, than of spirituous and vinous liquors and while it is impossible for me to state the exact number of such prescriptions and recommendations would say they were very numerous during the past thirty-five years.

I have found beer and ale particularly useful and beneficial in the feeble, aged and worn-out who required a pick-up at the end of the day, or easily digested nourishment at bed-time. Beer is a very valuable remedial agent in cases of convalescence from pneumonia and other diseases that seriously impair strength and vigor and in cases of exhaustion from over-work and worry or following shock and disability in dangerous and serious operations. I frequently prescribe small doses of dark beer as a stomach tonic for mal-nourished and rickety children and for that large class of poor little sufferers due to defective digestion. In the wasted condition following typhoid fever or suppurating bone diseases and in the weakened and exhausted tubercular patient requiring easily assimilated food, and particularly in cases in which there was con-

42 tinuously more or less pus in the circulation, I depended upon malt, beer and ale preparations as a food and tonic.

I know of no remedy in the pharmacop-eia equal to good malt liquors, beer and ale for the poor, over-worked mother of several children, with another hanging at her breast, for the life-giving fluids. There is no remedy equally good for the sustaining of the normal milk supply so necessary to the health of the little ones, and in the convalescence from child-bed with its long period of lactation there is no agent in the hands of the profession that will do as much for the benefit of the mother and child as good beer.

In the prolonged suppurating lung condition of tubercular patients I have seen the greatest possible benefit come from the nourishing and tonic qualities of beer.

I have found beer to be clean, wholesome and nutritious and containing, in the good beers, over ten per cent of essential and valuable food-stuffs (carbo-hydrates and proteins) in a very easily digested and beneficial form ready for assimilation. The hop derivatives of good beer exert a tonic action on the stomach and intestines, aid digestion and encourage sleep. In certain forms of stomach dyspepsia and in the intestinal variety of dyspepsia associated with nervous debility, especially in the over-worked and mentally-tired business man, suffering from over-exertion, good beer is an invaluable food and correcting agent and acts through directly nourishing the nervous centers.

I have found good beer a very valuable and beneficial remedy in sleeplessness associated with over-work and worry and preferred it throughout the most of my professional life to the drugs ordinarily used for sleeplessness. My doses have varied from a 43 teaspoonful for under-nourished children, before meals, to a glass or small bottle for the aged and feeble man or woman as a night cap before retiring, thus furnishing not only nourishment but much-desired rest and sleep, and in the emaciated and exhausted, during wasting diseases, or in tuberculosis, from one to three bottles a day, depending upon the effect.

I unhesitatingly pronounce good beer an invaluable tonic in and of itself but way and beyond its actual food value I recommend it for its stimulating and tonic effect on the stomach and intestinal secretions thus assisting in the digestion of food and the develop-

ment of energy and heat in all forms of convalescence, especially in mental and nervous exhaustion and as a soporific to the aged, feeble and worn-out and as a gland and body-builder in wasted physical conditions. I have prescribed beer in innumerable cases to the entire satisfaction of my patients and the therapeutic and nutritional results have been most satisfactory to myself, especially knowing that there were none of the habits developed that frequently follow drug medication. (Signed) Bryan D. Sheedy.

Sworn to before me this 20th day of December, 1921. (Sgd.)  
Nathan Ballin, Notary Public, etc.

44 United States District Court, Southern District of New York.

[Title omitted.]

**Affidavit of Maurice J. Lewi.**

STATE OF NEW YORK,  
*County of New York, ss:*

Maurice J. Lewi, being duly sworn, deposes and says:

I am a duly licensed physician and surgeon in the State of New York, and have practised for a great many years, but am not at present engaged in active practice, as my professional work is now that of consultant. I reside at the Sherman Square Hotel in the Borough of Manhattan, New York City.

I was born in Albany, New York, on December 1st, 1857, and am a graduate of Albany Medical College of the class of 1877.  
45 Subsequently I took post-graduate studies in the Universities of Vienna and Heidelberg, and returned to the United States about 1880, when I was duly licensed to practice medicine in the State of New York. Thereafter, I was engaged for many years in general practice, and was a lecturer in the Albany Medical College, and later Professor of Medical Jurisprudence in the Albany Law School. From 1891 to 1912 I was Secretary of the New York State Board of Medical Examiners.

I am now medical consultant of H. A. Metz Laboratories, Inc., a large chemical manufacturing corporation, and am also the President of the First Institute of Podiatry, and likewise President of the Foot Clinics of New York.

I have been asked to express an opinion as to the therapeutic efficacy of beer based upon my practical experience of over forty (40) years. I desire to state that from my medical reading, I know that many text book writers recommend beer and malt liquors generally, as an aid to digestion, and I, as a practicing physician, have found that, in some instances, when prescribed and used in moderation, beer and ale increase the appetite and stimulate the gastric secretion. I am of the opinion that it would be a great detriment to physicians who have been accustomed to prescribe malt liquors and malt extracts for their patients, to be deprived of this

right, and that the limitation to prescriptions of vinous and spirituous liquors is unwise, because, in many instances, these latter liquors do not answer the purpose, which are afforded by the nutritive properties of malt and hops, as contained in beer, ale and stout.

46 In many instances, patients have been benefitted, and much strengthened by the judicious use of malt liquors, and it is a hardship, in such cases, to prevent the attending physician from continuing the prescription of such malt liquors.

I am emphatically of the opinion that a great injustice is done, not only to the physician, but also to the patient, in such instances as the patient has been accustomed to the moderate use of malt liquors, and the system has been enured to it, and the deprivation by the denial of the right to prescribe, will undoubtedly work a hardship in these cases. Maurice J. Lewi.

Sworn to before me this 20th day of December, 1921. Nathan Ballin, Notary Public, Etc.

47 United States District Court, Southern District of New York

[Title omitted.]

**Affidavit of A. O. Gettler.**

STATE OF NEW YORK,  
*City of New York,*  
*County of New York, ss:*

A. O. Gettler, being duly sworn, deposes and says:

I reside at 115 Penn Street, Brooklyn, with offices at 400 East 29th Street, New York City, N. Y. I am a graduate of Columbia University in the Department of Chemistry with the degree of Ph. D.

I am Associate Professor of Chemistry in the University and Bellevue Hospital Medical College (Medical Department of New York University), Pathological Chemist of Bellevue Hospital; and Toxicologist to the Chief Medical Examiner of the City of New York.

48 I have, from time to time, made biological and medical analyses of beer such as produced prior to prohibition.

I have found beer, upon chemical and biological analyses, to be a wholesome beverage. A well-made beer is healthful, clean and non-toxic. It is manufactured from the best of barley, hops and yeast. Food-stuffs, essential carbohydrates and proteins are contained in the barley. The hops (plant origin) contain the flavoring and extractives. The yeast is added for the conversion of the starch into sugars and the production of alcohol and of carbon dioxide gas, which gas gives to the beer its froth and sparkle. The following is an analysis which may be accepted as a standard for beers produced prior to prohibition:

*Composition of Beer Before Prohibition.*

Water . . . . .	87 to 91%
Alcohol . . . . .	3 to 6%
Nitrogenous substances . . . . .	0.6 to 0.8%
Extractives . . . . .	5 to 7%
Sugars . . . . .	0.9 to 2.6%
Dextrine, etc. . . . .	2 to 4%
Lactic Acid . . . . .	0.2 to 0.4%
Glycerine . . . . .	0.1 to 0.2%
Inorganic Salts . . . . .	0.3 to 0.5%
Carbon Dioxide . . . . .	0.2 to 0.3%
Vitamines . . . . .	Present (amount undetermined).

The chemical analysis of beer reveals the presence of valuable food-stuffs, so that in partaking of same, it not only serves to quench the thirst, but, unknowingly, the participant obtains very valuable materials which the body uses for building up tissues and for producing energy and heat. The alcohol in beer (3 to 6%) is 49 so dilute that it is not toxic to the organism. On the contrary, it has been experimentally proven that it is an energy-producing substance as well as a tonic.

Such beer also contains vitamines. Their origin has been traced to the yeast. These vitamines, discovered only a few years ago, are gaining more prominence as scientific investigation proceeds. The constitution of these vitamines is still unknown. They are organic substances found in certain foods which are essential to life. Their absence from our dietary brings on pathological conditions such as neuritis, beri-beri, rickets, xerophthalmia and scurvy. Yeast is one of the sources of these vitamines, and, in brewing, they are transferred, by diffusion, to the beer, imparting to beer a most valuable property. Alexander O. Gettler, M. D.

Sworn to before me this 21st day of December, 1921. Nathan Ballin, Notary Public, etc.

50 United States District Court, Southern District of New York.

[Title omitted.]

**Affidavit of Armin V. St. George.**

STATE OF NEW YORK,

*City of New York,*

*County of New York, ss:*

Armin St. George, being duly sworn, deposes and says:

My residence and office are at #59 West 54th Street, New York City. I am a graduate of Columbia University—of the College of Pharmacy (Ph. C., 1910;—Pharmaceutical Chemist) and of the

College of Physicians and Surgeons (M. D., 1914) and an Assistant Director of Laboratories of the Bellevue and Allied Hospitals of New York City.

Before and since Prohibition, I have given the study of alcoholics in the practice of medicine great attention and frequent consideration. Beers, comprising lager, ale, porter, stout, maltonies, etc., as formerly brewed, I have examined by analysis and have valued in the light of scientific knowledge and current practice.

Without reserve, I pronounce pure, well-made barley, malt and hop beers as very valuable medical adjuvants, which, in frequent instances of the daily practice of physicians, in general and special fields, are indispensable and without equally efficacious substitutes. I bear testimony to this from professional experience, both of myself and large numbers of my colleagues.

Until prohibition was enacted the benefit to be derived by the use of malt liquors in medical practice was universally held to be axiomatic. Since the abolition of that use by legislators, the absence of beer has left the physician helpless in many instances, such as in certain conditions in lactation, and has greatly handicapped him, to the detriment of the patient, in convalescence and in many debilities.

I am familiar with the writings of authorities in my profession and their evaluation of the therapeutic value of alcohol, including fermented malt liquors. My personal experience and that of colleagues bears out fully the values placed upon beer by them. Specifically I refer to the following authorities and literature now citing such publications by them as contain their evaluation of alcohol, and of beers as therapeutic agents:

52 Abraham Jacobi, M. D., L. L. D., M. A. The "Nestor of American Medicine."—The Medical Economist: July, 1918.

William Osler, M. D., L. L. D. Regius Professor of Medicine, Oxford University Fellow of the Royal College of Physicians, London. Honorary Professor of Medicine, John Hopkins Hospital, Baltimore. Etc.—The Principles and Practice of Medicine, 1906.

William Edward Fitch, M. D. Major, Med. Reserve Corps, U. S. A. Formerly Lecturer on Surgery, Fordham University of Medicine. Assistant Attending Gynecologist, Presbyterian Hospital Dispensary, New York, Attending Physician, Vanderbilt Clinic, College of P. & S., New York.—Dietotherapy,—published by permission of Surgeon General of the U. S. 1918 (and 40 contributors).

Julius Friedenwald, M. D., Professor of Gastro-Enterology. College of P. & S., Baltimore.

John Ruhrah, M. D. Professor of Children's Diseases, College of P. & S., Baltimore.—Diet in Health and Disease, 1917.

Louis Fischer, M. D. Pediatrician to Zion Hospital, Suydenham Hospital, N. Y. Etc.—Diseases of Infancy and Childhood. 1914.

Charles Gilmore Kerley, M. D. Professor of Diseases of Children, N. Y. Polyclinic School and Hospital. Attending Physician to the N. Y. Nursery and Child's Hospital. Etc.—The Practice of Pediatrics. 1918.

53 Charles Hunter Dunn, M. D. Instructor in Pediatrics, Harvard. Physician-in-Chief at the Infant's Hospital, Etc.—Pediatrics, the Hygiene and Medical Treatment of Children. 1917.

L Emmett Holt, M. D., Sc. D., L. L. D. Professor of Diseases of Childhood, College of P. & S., N. Y. Attending Physician to the Babies' and Foundling Hospital, Etc.

John Howland, A. M., M. D. Professor of Pediatrics in Johns Hopkins University, Baltimore. Pediatrician-in-Chief to Johns Hopkins Hospital. Etc.—The Diseases of Infancy and Childhood. 1916.

Arthur R. Cushny, M. D., L. L. D., F. R. S. Professor of Pharmacology, University of London. Examiner in University of London, Manchester, Oxford, Cambridge, Glasgow, Leeds. Etc.—A Text-book of Pharmacology and Therapeutics. 1918.

Benjamin Knox Rachford, M. D. Professor of Diseases of Children, Ohio Miami College, department of medicine of the University of Cincinnati. Pediatrician to the Cincinnati Hospital. Ex-President of the American Pediatric Society. Etc.—Diseases of Children. 1912.

Chalmers Watson, M. D., F. R. C. P. S. Assistant Physician, Royal Infirmary, Edinburgh. Editor, Encyclopedia Medica. Etc.—Food and Feeding in Health and Disease. 1913.

54 Robert Hutchinson, M. D., F. R. C. P. Edin. Physician to the London Hospital. Physician to the Hospital for Sick Children, London.—Food: the Principles of Dietetics. 1917.

Robert F. Williams, M. A., M. D. Professor of Practice of Medicine in Medical College of Virginia. Etc.—Food and Diet in Health and Disease. 1906.

A. A. Stevens, A. M., M. D. Professor of Therapeutics and Clinical Medicine, Women's College of Penna. Lecturer of Physical Diagnosis in the Univ. of Penna. Etc.—Materia Medica and Therapeutics. 1909.

William Tibbles, M. D., L. L. D., L. R. C. P., etc. Medical officer of Health, Fellow of the Royal Institute of Public Health, London. Etc.—Dietetics, or Food in Health and Disease. 1914.

A. Langdon Brown, M. D., F. R. C. P. Assistant Physician to St. Bartholomew's Hospital. Physician to the Metropolitan London. Etc.

Keough Murphy, M. C., F. R. C. S. Surgeon to the Miller General Hospital for Southeast London. Surgeon to Paddington Green Children's Hospital. Etc.—Encyclopædia of Medical Treatment. 1915.

—Medical Brief, St. Louis, July, 1918.

55 Daniel M. Hoyt, M. D. Formerly Instructor in Therapeutics, University of Pennsylvania. Assistant Physician to the Philadelphia General Hospital.—Practical Therapeutics. 1914.

Hobart Amory Hare, M. D., B. Sc. Professor of Therapeutics and Materia Medica in the Jefferson Medical College of Philadelphia. Physician to the Jefferson Medical College Hospital. Etc.—Practical Therapeutics. 1916.

A. A. Brill, Ph. B., M. D., Assistant Professor of Psychiatry, New York Post Graduate Medical School and Hospital. Lecturer on Abnormal Psychology, New York University. Etc.—Miscellaneous writings. 1918.

Charles E. De M. Sajous, M. D., Professor of Therapeutics in the Temple University of Pennsylvania. Formerly Professor in the Medico-Chirurgical College and Clinical Lecturer in Jefferson Medical College. Etc.—Analytical Cyclopedia of Practical Medicine 1907.—and 100 associate editors.

Rakhaldas Ghoar, L. M. S. Lecturer on Materia Medica, Calcutta Medical School.

B. H. Daare, Lieutenant-Colonel India Medical Service, Professor of Materia Medica and Clinical Medicine, Medical College of Bengal. Physician to the College Hospital; Fellow of the University of Calcutta. Etc.

56 Birendea Nate Ghosh, F. R. F. P. S., Lecturer of Pharmacology. College of Physicians and Surgeons of Bengal. Fellow of the Royal Society of Medicine.—Materia Medica and Therapeutics. 1916.

Alfred C. Croftan, M. D., Author of Clinical Crology.—Clinical Therapeutics. 1910.

George F. Butler, A. M., Ph. G., M. D., Professor and Head of the Department of Therapeutics and Professor of Preventive and Clinical Medicine, Chicago College of Medicine and Surgery. Medical Department, Valparaiso University. Etc.—Materia Medica, Pharmacology and Therapeutics. 1908.

H. Edward Lewis, M. D. Editor of American Medicine. Formerly Instructor in Chemistry and Dietetics. Fanny Allen Hospital Training School for Nurses. Formerly Attending Physician New York Nose, Throat and Lung Hospital. Etc.—Diet for the Sick 1916.

Walter A. Bastedo, Ph. G., M. D. Assistant Professor of Clinical Medicine, Columbia University. Associate Attending Physician, St. Luke's Hospital, New York. Attending Physician, City Hospital, New York. Formerly Curator New York Botanical Garden. Etc.—Materia Medica and Pharmacology. 1918.

Louis Kolifinski, M. D., Washington, D. C.—“New York Medical News,” Oct. 5, 1901.

57 Paul Bartholow, A. B., M. D. Professor Emeritus of Materia Medica, General Therapeutics, and Hygiene, Jefferson Medical College of Philadelphia. Formerly Professor of Materia Medica and Therapeutics and the Practice of Medicine in the Medical College of Ohio. Etc.—Materia Medica and Therapeutics. 1906.

John William Springthorpe, M. A., M. D., N. E. C. P. Senior Physician to the Melbourne Australian Hospital. Lecturer on Therapeutics, Dietetics and Hygiene, and Dean of the Faculty of Dentistry in the University of Melbourne. Etc.—Therapeutics, Dietetics and Hygiene. 1914.

W. Hale White, M. D., Lieutenant Colonel, R. A. M. C. Senior Physician and Lecturer on Medicine at Guy Hospital. Editor of

"A Textbook on Pharmacy and Therapeutics." Etc.—*Materia Medica, Pharmacy, Pharmacology and Therapeutics.* 1916.

1. Burney Yeo, M. D., F. R. C. P. Emeritus Professor of Medicine in King's College. Consulting Physician to King's College Hospital. Etc.

E. Farquhar Buzzard, M. A., M. D., F. R. C. P. Physician for out-Patients to St. Thomas Hospital and to the National Hospital for the Paralyzed and Epileptic. Etc.—*Medical Treatment and Therapeutics.* 1913.

58 Reynold Webb Wilcox, M. A., M. D., L. L. D., D. C. L. President of the American College of Physicians. Retired Professor of Medicine of the New York Post Graduate Medical School and Hospital. Formerly President of the Association of the Medical Reserve Corps, United States Army. Etc.—*Materia Medica and Therapeutics.* 1917.

D. H. Borgey, A. M., M. D., D. F. H. Assistant Professor of Hygiene and Bacteriology, University of Pennsylvania. Etc.—*Principles of Hygiene,* 1918.

Torald Sollman, M. D., Professor Pharmacology and *Materia Medica* in the School of Medicine of Western Reserve University, Cleveland, Ohio.—*Pharmacology, Therapeutics and Toxicology.* 1917.

Horatio C. Wood, M. D., L. L. D. Emeritus Professor of *Materia Medica* and Therapeutics in the University of Pennsylvania. Etc.

Horatio C. Wood, Jr., M. D. Associate Professor of Pharmacology in the University of Pennsylvania. Etc.—Assistant Physician to the Philadelphia General Hospital. Etc.—*Therapeutics.* 1908.

Charles A. Orr, A. M., M. D., Crafton, Pa.—*Materia Medica and Therapeutics.*

59 Oliver T. Osborne, A. M., M. B. Professor of *Materia Medica, Therapeutics and Clinical Medicine* in Yale Medical School. Ex-Chairman of the section on Pharmacology and Therapeutics of the American Medical Association. Etc.—*Handbook of Therapy.* 1910.

George Sheever Shattuck, M. D., Assistant Physician to the Massachusetts Hospital. Etc.—*Principles of Medical Treatment.* 1916.

Samuel L. Potter, A. M., M. D., M. R. C. P., London. Formerly Professor of the Principles and Practice of Medicine in the Cooper Medical College of San Francisco. Late Major and Surgeon of Volunteers, United States Army. Etc.

Elmer H. Funk, M. D. Associate in Medicine. Jefferson Medical College, Philadelphia. Assistant Physician to the Philadelphia Hospital. Etc.—*Therapeutics, Materia Medica and Pharmacy.* 1917.

John V. Shoemaker, M. D., L. L. D. Professor of *Materia Medica, Pharmacology, Therapeutics and Clinical Medicine, and Clinical Professor of Diseases of the Skin* in the Medico-Chirurgical College of Pennsylvania. Etc.—*Materia Medica and Therapeutics.* 1908.

John H. Mussner, Jr., B. S., M. D. Associate in medicine in the University of Pennsylvania. Etc.

60 Thomas C. Kelly, A. M., M. D., Instructor in Medicine in the University of Pennsylvania. Etc.—Practical treatment 1917, and many other writers.

W. Gilman Thompson, M. D. Professor of Clinical Medicine in the Cornell University Medical College, New York City. Visiting Physician to the Presbyterian and Bellevue Hospitals. Etc.—Practical Dietetics. 1906.

The following is a brief and concise summary of the verdict of the foregoing authorities, as applied to alcohol and, more especially, as applied to fermented malt liquors, expressed in popular rather than scientific form, citing, alphabetically for convenience, their indication in, and use for the enumerated ills, which, however, by no means exhaust the service of beer:

In/or for the      Summary of Verdict of the Authorities Cited:

Aged	—benefited by alcohol; a valuable and indispensable remedy for the, Jacobi. —beneficial effects marked in the, Hutchinson. —frequently eat more food when accompanied by beer, Tibbles. —useful to the, Tibbles. —is an aid to the, Brown: Murphy. —very valuable for the indigestion of the, White. —one of the most valuable remedies to increase appetite in the, Wilcox. —aids digestion, especially in the, Potter: Funk.
------	---

61

Anemia, Cerebral—produces satisfactory sleep, when wakefulness is due to, Bartholow.

Anti-Seorbetic—is a restorative, due to live factor in malt extracts Fischer.

Anti-Spasmotic—is valuable as, due to hop principle, Hare.  
—as a mild sedative, Bastedo. Orr.  
—(And several of the other authorities).

Appetite	Stimulates the, Fitch. —bitter hop principle encourages, Fitch. —gives relish to food and increases, Tibbles. —improves, Butler. —one of the most valuable remedies to increase, Wilcox.
----------	--

Biliousness —(See indigestion, gastric catarrh, etc. below.)

Cardiac Energy—is truly life-preserving, due to powers to sustain Tibbles.

Circulation	—as cardias stimulant, Mutler. serves to stimulate the, Borgey. —as an equalizer of the, Orr. —is useful in circulatory disorders in the infectious diseases of emaciated patients; Shattuck.
-------------	--

Colic, Flatulent—for their carminative action in, Bastedo.  
 —may be employed with advantage in, Wilcox.

<sup>62</sup>

Convalescence—benefited by alcohol; a valuable and indispensable remedy in, Jacobi.  
 —in protracted; from acute diseases; Rachford.  
 —frequently eat more food when accompanied by beer, Tibbles.  
 —useful to convalecents, Tibbles.  
 —as an aid to, Brown.  
 —for effect on appetite in, Bastedo.  
 —in, from acute diseases, surgical injuries, protracted suppuration, prolonged lactation, diseases of joints, serofula, phthisis, etc., Bartholow.  
 —as a systematic support in, Orr.  
 —in convalescence from fevers; Shoemaker.  
 —in protracted convalescence from severe forms of acute diseases; Thompson.

Debility  
 —valuable, when induced by disease, over-exertion, worry, neuralgia and the like; Fitch.  
 —debilitated persons frequently eat more food when accepted with beer, Tibbles.

<sup>63</sup>

Delirium  
 —valuable in some forms of, Hutchinson.  
 —greatly benefited by alcohol in acute maniacal, when coexisting with conditions of adynamis, Bartholow.  
 —quiets delirium, Wilcox.

Delirium Tremens—when coexistent with condition of adynamis, greatly benefited by alcohol, Bartholow.  
 —to aid digestion, even in, Wood: Wood, Jr.  
 —as preventative of drunkenness and chronic alcoholism of decided advantage in, Thompson.

Diarrhea  
 —in infants, small doses beneficial in, Jacobi.

Digestion  
 —in mild, may be employed with advantage, Wilcox.  
 —actually aids, by stimulating increased gastrict juice secretion, Fitch.  
 —in moderate quantities, aids; aids gastrie, Friedenwald: Ruhrah.  
 —aids, by increasing flow of saliva; Tibbles.  
 —diastase therein aids digestion of starchy foods; Sajours;  
 —also Lewis.  
 —aids digestion and absorption; White.  
 —are of the most valuable remedies to improve, Wilcox.  
 —stimulates the, Borgey.  
 —aids digestion in chronic diseases; Wood: Wood, Jr.  
 —an efficient aid to, Potter: Funk.  
 —useful in weak, Shoemaker.

Disease	—valuable in certain forms of, Fitch. —of service in instances of exhaustion from, Wilcox. —for those suffering from exhausting discharge, Thompson.
64	
Dysentery	—in infants, small doses beneficial in, Jacobi.
Dyspepsia	—valuable in certain forms of, Fitch. —an excellent stomachic tonic in, Potter: Funk. —useful in flatulent, Thompson.
Exhaustion, General	—beers have served well in, Brill. (See "over-work," "over-exertion," etc.)
Fatigue	—beneficial effects marked in, Hutchinson.
Fainting	—for their reflex action in, Bastedo.
Feeble	—benefited by alcohol; a valuable and indispensable remedy, Jacobi. —useful to the, Tibbles. —very valuable for the indigestion of the, White. —one of the most valuable remedies to increase the appetite of the, Wilcox. —aids digestion especially in the, Potter: Funk.
Fermentation, Internal	—arrested by alcohol, Jacobi.
Fevers	—in restlessness of, due to hypnotic quality of hops, Stevens. —after enteric, Osler. —patient may take in, as much as he can tolerate, White.
65	
Food	—as a systematic support in low, Orr. —in, when it will slake the thirst, Thompson. —alcohol is a food, when solid carbohydrates are not tolerated, Jacobi. —more nourishment in beers than in any other alcoholic beverage, Fitch. —employed as, Stevens. —contains a material amount of diet deficiency substances; vitamins, Medical Brief. —of value as, Hoyt. —the stronger malt liquors are nutritive and fattening, Thompson. —contain sufficient extractives to give beers food value, Springthorpe. —to furnish food in chronic diseases that is absorbed without digestive effort, Wood: Wood, Jr.
Gastric Catarrh	—in acute, given children, to aid nutrition, Fischer. —in conditions of diminishing gastric secretion, Bastedo.
Hypnotic	—(Commented on favorably as a hypnotic by several authorities.—A. C. St. G.) —produces less derangement than most other hypnotics, Sollman. —possesses narcotic influence, Thompson.

Hysteria	—nervous sedative in, due to hops, Hare. —as a mild sedative in, Bastedo. —may be employed with advantage in, Wileox.
Illness	—made tolerable by them, Cushney.
Indigestion	—it may relieve painful, White.
66	
Insomnia	—in tuberculosis, to lessen, Williams. —has served well, where hesitated to use stronger narcotics, Brill. —hops contribute hypnotic power in, Bastedo. —singularly good results offered in sleeplessness, Kolifinski.
Internal Tract	—protected by alcohol, when solid carbohydrates not tolerated, Jacobi. —prevents destruction of, Fitch.
Joints, Diseases of	—justly esteemed in cases of, as restorative, Bartholow.
Lactation	—will increase mother's milk supply, Fischer. —increases fat content of mother's milk, frequently 2% in 2-3 days, Kerley. —increases mother's milk quantity and fat proportions, Holt: Howland. —as a restorative after protracted, Bartholow.
Laxative	—has decided effect in tendency to constipation, Fischer.
Malnutrition	—proper beers increase bowel action, Hare. —of children; valuable and easily tolerated by children, Dunn.
Nausea	—extremely valuable in cases of, Hoyt. —singularly good results obtained in, Kolifinski. —may relieve gastric pain and allay, Wileox.
67	
Nervous Energy	—truly life-preserving due to powers to sustain, Tibeles. —stimulates nervous system, Borgey. —a feeble narcotic to quiet nervous irritability, Wood: Wood, Jr.
Nervousness	—a sedative in; due to hops, Hare. —as a mild sedative in, Bastedo. —to quiet nervous irritability, Wood: Wood, Jr. —as sedative in, Orr. —as a calmative and hypnotic in nervous irritability, Potter: Funk.
Neuralgia	—valuable in disease caused by, Fitch. —of value to sufferers from, Tibeles.
Night Sweats	—in tuberculosis to lessen, Williams.
Neurasthenia	—to strengthen digestion in, Wood: Wood, Jr.

**Nursing Mother**—unwise to discontinue for N. M. who are accustomed to beer, Fischer.

—increases quantity of milk, Fischer.

—increases fat in mother's milk, frequently 2% in 2-3 days, Kerley.

—increases mother's milk quantity, Holt: Howland.  
—improves appetite of mother and her milk, Hutchinson.

—extremely valuable to increase supply of mother's milk, Hoyt.

—increases amount of fats in mother's milk, Bartholow.

—for women exhausted by prolonged suckling, Thompson.

68

**Nutritive Supply**—as agent to introduce increased, Fitch.

—increase assimilation of non-nitrogenous food supply, Medical Brief.

—the stronger malt liquors are nutritive and fattening, Thompson.

**Over-Exertion**—valuable in disease caused by, and/or, Fitch.

**Over-Work**—beneficial effects from overwork and/or markedly improved, Hutchinson.

**Worry**

—of value in overwork, Tibeles.

—very valuable for those thoroughly exhausted by overwork, White.

—of service in increasing the appetite in exhaustion from overwork, Wileox.

—efficient aid to persons greatly exhausted from overwork, Potter: Funk.

—valuable in disease when caused by, Fitch.

—of value in, Tibeles.

**Pain**

—may be used to relieve; due to narcotic quality, Wileox.

—to lessen sufferings of patients as an antipyretic, narcotic and stimulant, Wood: Wood, Jr.

**Phthisis**

—chiefly valuable for persons suffering from wasting diseases, such as, Ghosh: Deane: Ghosh.

—justly esteemed in convalescence in cases of, Bartholow.

—very few cases of, that are not benefited by alcoholic stimulation;

69

—patient allowed 2-3 glasses of beer per day, Yeo: Crawford; Buzzard.

—perfectly justifiable, often beneficial, to lessen sufferings in, Wood; Wood, Jr.

**Pneumonia**

—in, Osler.

—may pull patient through crisis in, Tibeles.

**Puerperal Mania**—when coexistent with condition of adynamia, greatly benefited by alcohol, Bartholow.

Serofulosis —often beneficial in, Wood, Wood, Jr.  
 Seury —beer has influence for good in, Yeo; Crawford;  
     Buzzard.

Sedentary Occupation—useful in, when in need of stimulation, Tibbles.  
     —one of the most valuable remedies for people in;  
     to increase appetite; Wilcox.  
     —employed with advantage in those of; who have  
     greatly enfeebled digestion; Thompson.

Sleep —bitter hop principle encourages, Fitch.  
     —promotes rest and; is a mild hypnotic; Cuhshny.  
     —induces more nearly natural, than drugs; Hutchinson.  
     —the hops renders beers sedative as well as hypnotic;  
     Springthorpe.  
     —has well-known power to induce, Yeo; Crawford;  
     Buzzard.  
     —promotes, Wilcox.

70 Soporific —ideal; far better than opium and induces more nearly  
     natural sleep; Hutchinson.  
     —especially useful in the evening as, Croftan.  
     —as a; most marked in women; Kolifinsky.  
     —has well-known power to induce sleep, Yeo; Craw-  
     ford; Buzzard.  
     —produces calm after cerebral excitement, as a, Potter;  
     Funk.

Stomachic —aiding digestion, as a, Jacobi.  
     —exerts tonic action on the stomach, Fitch.  
     —employed internally as, Stevens.  
     —efficient, Butler.  
     —justly esteemed as, in chronic wasting diseases,  
     Bartholow.  
     —easily tolerated by the stomach; White.  
     —carminative, due to hop principle; also,—stomachic  
     properties greater than wine or spirits; Wilcox.

Suppuration, Protracted—justly esteemed in case of profuse and,  
     Bartholow.

Surgical Injuries—justly esteemed in convalescence after, Bartholow.  
 System —invigorates, the, Fitch.  
     —to arouse and support the flagging powers in sudden  
     depression of the, Wilcox.

Tuberculosis —beers are best preparations when digestion is good  
     in, Stevens.  
     —lessens tissue waste in, and retards progress of the  
     disease; Wilcox.  
 71      —to stimulate appetite and aid digestion in, Musser;  
     Kelly.  
     —"greatest possible service in tuberculosis when fever  
     is present," Musser; Kelly quoting Latham upon Otis.

Typhoid	—in, where underfed by weakened digestive capacity; in children, given as food, not as stimulant; Rachford.
Vertigo	—for emaciated patients, in, Shattuck.
Vomiting	—singularly good results obtained in, Kolifinski.
	—as a specific in acute; intolerance is rare; Kolifinski.
	—supplies good results in bilious vomiting; Kolifinski.
	—may relieve painful vomiting; Wilcox.
Wasting Conditions & Diseases	—valuable in, Hare.
	—as in phthisis, Ghosh; Deane; Ghosh.
	—justly esteemed as restorative in, Bartholow.
	—very valuable food for persons suffering from, White.
	—as a systematic support in, Orr.

(Signed) A. V. St. George, M. D.

Sworn to before me this 21st day of December, 1921. (Signed)  
Richard F. Maloney, Notary Public, etc.

72 United States District Court, Southern District of New York.

[Title omitted.]

### Affidavit of Ralph Hayward Pomeroy.

#### STATE OF NEW YORK,

*City of New York, County of Kings, ss:*

Ralph Hayward Pomeroy, being duly sworn, deposes and says:  
I reside at 93 Remsen Street, Brooklyn, and have my office at the same address.

I am a graduate of Long Island College Hospital and have practiced medicine and surgery in the Borough of Brooklyn, City of New York, under due license by the State of New York since 1891. During the past fifteen years, my practice has been limited to the field of Gynecology and Obstetrics. At the present time I am Attending Gynecologist and Obstetrician to the Brooklyn Hospital and Consulting Obstetrician at Kings County, St. John's, Methodist

73 Episcopal and Bushwick Hospitals. I have occupied the position of President of the Medical Society of the County of Kings and am at present a member of the Board of Trustees. I am a Fellow of the American College of Surgeons, and of the American Gynecological Society. At the present time I hold office as President of the New York Obstetrical Society.

In the course of many years of Consulting and Hospital practice in the field of Obstetrics (management of child-birth) I have had occasion to advise in numerous cases of puerperal (child-birth) fever which, for reasons understood but thus far uncontrolled, is still a terrible scourge among child-bearing women. In considering the more formidable and protracted illness types of these infection fevers,

I testify to an opinion of myself and other authorities on obstetrics that the liberal use of high-grade quality of beer of 3 to 6% alcoholic content is a most valuable resource in supporting the nutrition of the patient, encouraging the amount of fluid intake and output, in conjunction with a reasonably assumed specific effect of properly diluted alcohol in combating the actual toxic and lethal effects of the septic poisons diffused through the body of the unfortunate patient.  
(Signed) Ralph H. Pomeroy.

Sworn to before me this 19th day of December, 1921. (Sgd.)  
Andrew C. Kopf, Notary Public, etc.

74 United States District Court, Southern District of New York.

[Title omitted.]

### Affidavit of William F. Cunningham.

STATE OF NEW YORK,

*City of New York, County of New York, ss:*

William F. Cunningham, being duly sworn, deposes as follows:  
I reside and maintain offices at 116 East 63rd Street, New York City; am a graduate of Yale Medical College (1911); Adjunct-Attending Surgeon of Bellevue Hospital, New York City; and Instructor in Surgery at the College of Physicians and Surgeons, Columbia University in the City of New York.

I am engaged in the general practice of medicine and surgery.

Pure beer has always had and has its proper place in medicine. Its absence from the pharmacopeia, like many other remedial agents in medical practice, is merely testimony to its harmless character.

I have prescribed beer extensively and have found it beneficial in all instances. Nothing can take its place in cases where beer finds particular application as, for example, in increasing the flow of mother's milk, particularly in women of racial stocks accustomed to it.

Pure beer has greater application than any other class of alcoholies, and has achieved the return to good health in a greater variety of human ills and for a greater number of sufferers than any other like medicinal agent.

I have found that beer is beneficially employed in cases as follows:

- (1) By those whose nervous organization is easily overtaxed or who lose all appetite through over-exertion, fatigue or worry;
- (2) By people of weakened digestion, due to sedentary occupations; and, in a large number of instances.

(3) By convalescents from severe, prolonged or acute diseases.

In convalescence from the greater number of human ills, not only after diseases, but after injuries and post-operative cases, it is beneficially employed. In conditions of debility, in young and old, pure beer performs a positive service when properly prescribed. To cor-

reet many gastric disturbances, to bring to normal the underfed and underweight, to aid digestion, and generally to invigorate debilitated systems, no alcoholic medicinal agent can take the place of beer. Moreover, beer, viewed as a drug, has many properties possessed by no other, *than* gives it the preference, as when employed to rid the patient of certain forms of nervousness and insomnia; it is equally beneficial, but milder and without the after-effects of substitutes now used in place of beer.

Beer is needed in the practice of medicine. W. F. Cunningham.

Sworn to before me this 21st day of December, 1921. Richard F. Moloney, Notary Public, 209, New York County. Register's No. 3134. Commission expires March 30, 1923.

77 United States District Court, Southern District of New York.

[Title omitted.]

### Affidavit of Herman Gliboff.

#### STATE OF NEW YORK.

*City of New York. County of Queens, ss:*

Herman Gliboff, being duly sworn, deposes and says: I reside at 116-12 Boulevard, Rockaway Park, New York City, where I also maintain my offices.

I am a graduate of the College of Physicians and Surgeons, Columbia University, and for the past three years have been a licensed practicing physician in New York State.

During my studies and practice of medicine, I have found beer that is made of malt and hops, to be very essential to the following diseases and conditions of the body:

- (1) In Anemia which is due to the loss of blood;
- (2) in undernourishment and improper assimilation of foods;
- (3) in authenia, which is weakness, caused by a number of ills;
- (4) for nursing mothers, by increasing the quantity and quality of the milk to be supplied to the infant;
- (5) in post-operative causes,—used as a body-builder;
- (6) in digestive disturbances;
- (7) in insomnia;
- (8) and following upon and in a number of prolonged severe and wasting diseases, such as:
  - (a) Typhoid Fever;
  - (b) Pneumonia;
  - (c) Influenza;
  - (d) Eucaphilites, Lethargiea, etc.

Beer, unlike the spirituous liquors, is not necessarily used in emergency cases to save life, but if used during a longer period of time aids in building up the tissues and general health of the body, and in this manner will prolong life and therefore save life.

Beer not only aids in saving life but in cases such as insomnia, it gives great relief, which people are now getting through the use of harmful drugs, because of their inability to obtain beer. (Sgd.) Herman Gliboff, M. D., 116-12 Boulevard, Rockaway Park, N. Y.

Sworn to before me this 19th day of December, 1921. (Sgd.) H. J. Sprewg, Notary Public, etc.

79 United States District Court, Southern District of New York.

[Title omitted.]

**Affidavit of Gustav Scholer, M. D.**

STATE OF NEW YORK,  
City of New York,  
County of New York, ss:

Gustav Scholer, M. D., being duly sworn, deposes and says:

I reside at 10 Jumel Terrace, Rear W. 162nd St., New York City, New York, where I also maintain my office.

As a physician of over 35 years' practice including service at Hospitals and Dispensaries, I found that the administration of wholesome beer has given excellent results to patients suffering from debility.

Malt which forms the major ingredient of beer is a food beneficial to nursing mothers, it is a tissue builder, it checks febrile and 80 inflammatory processes. It has been in use from time of Hippocrates.

Hops also an ingredient of beer make a splendid tonic for Dyspepsia, have a diuretic effect and act in a soothing form in nervous tremors and wakefulness.

Beer a combination of Malt and Hops is highly recommendable as a true medicinal tonic, its production ought not be suppressed, on the contrary, it ought to be encouraged and made of sufficient strength.

I consider good beer a wholesome beverage for the commonwealth.  
(Signed) Gustav Scholer, M. D.

Sworn to before me this 20th day of December, 1921. (Sgd.) Ernest E. Thomas, Notary Public, etc.

81 United States District Court, Southern District of New York

[Title omitted.]

**Affidavit of William J. Maroney.**

**STATE OF NEW YORK,**  
*City of New York,*  
*County of New York, ss:*

William J. Maroney, being duly sworn, deposes as follows:

I reside at Woodmere, Long Island and maintain offices at #11 East 48th Street, New York City, New York. I am a graduate of the Yale Medical School, 1900; Visiting Obstetrician to St. Ann's Hospital,—the obstetrical department of the New York Foundling Hospital; and Assistant-Attending Gynecologist to St. Vincent's Hospital.

During the twenty years (20 yrs.) of my practice, the past eleven (11) of which were limited to obstetrics and gynecology, I have extensively prescribed fermented malt liquors, beer and ale.

82 My use of beer, in hospital and home, has been restricted to prescriptions for nursing mothers. Before Prohibition, I prescribed fermented malt liquors in a majority of maternity cases.

Good beer and ale are invaluable in lactation. To-day unfortunately many mothers in moderate circumstances are unable properly to nurse their babies, particularly the first-born. Before Prohibition, beer and ale, were cheap and indispensable adjuvants, both to increase the quantity of the nursing mother's milk and especially to improve its quality in essential fat content, necessary to the baby's health and growth. The prohibition of one of the best, indeed, in many maternity cases of moderately circumstanced families, the only desirable and efficacious medicinal agent, is an act arbitrary, blind and indefensible. There is nothing greater than the life of the first-born and the new-born and it is this life that is frequently endangered and injured to-day by the prohibition of prescription of malt liquors by the medical profession. (Sgd.) Wm. J. Maroney.

Sworn to before me this 20th day of December, 1921. (Sgd.) Edmund Kolb, Notary Public, etc.

83 United States District Court, Southern District of New York

[Title omitted.]

**Affidavit of Graeme M. Hammond.**

**STATE OF NEW YORK,**  
*City of New York,*  
*County of New York, ss:*

Graeme M. Hammond, being duly sworn, deposes and says:

I reside and maintain an office at 60 West 55th Street, New York City.

I have always used malt liquors for my patients ever since I have been in practice,—over forty years.

I consider beer, when taken advisedly, an excellent tonic and a stimulant to the appetite and to digestion. It is most beneficial at bed-time in cases of insomnia, and for cases of neurasthenia as a food and mild tonic. In cases of incipient tuberculosis, I would give it daily. It is one of the incomprehensible features of the Volstead law that while I may give a patient liquor containing fifty percent alcohol, I am forbidden to prescribe a beverage containing only seven percent alcohol. (Sgd.) Graeme M. Hammond.

Sworn to before me this 21st day of December, 1921. (Sgd.)  
H. W. Meader, Notary Public, etc.

85 United States District Court, Southern District of New York.

[Title omitted.]

**Affidavit of Luigi Celano.**

STATE OF NEW YORK,  
*City of New York,*  
*County of Bronx, ss:*

Luigi Celano, being duly sworn, deposes as follows:

I reside and have offices at #2282 Arthur Avenue, Bronx, New York City.

I am a graduate of the College of Physicians and Surgeons, Columbia University, in the City of New York (1913.) I am Instructor in Surgery in the New York University Medical School and Assistant-Attending Surgeon to the Italian Hospital, New York City. Since my graduation I have specialized in surgery.

86 Extensive medical use of beer throughout my practice has, in all cases, when prescribed, obtained entirely satisfactory results. In convalescence, following upon injury, in post-operative treatment, in cases following upon debility generally; I have found beer to be a very valuable medicinal servant. Its proper place has not been and cannot be taken by any other substitutes. Luigi Celano.

Sworn to before me this 21st day of December, 1921. Richard F. Maloney, Notary Public.

87      United States District Court, Southern District of New York.

**Affidavit of William J. Mathews.**

[Title omitted.]

**STATE OF NEW JERSEY,**  
*County of Hudson, ss:*

William J. Mathews,, being duly sworn, deposes and says:

I reside at #938 Hudson Street, Hoboken, New Jersey, where I also maintain my office. I am a graduate (1900) of the Medico Chirurgical College of Philadelphia, Pa., and also a Graduate Pharmacist of its pharmacy department. I am engaged in the general practice of medicine and surgery and am Attending Physician to St. Mary's Hospital in Hoboken, N. J.

I have extensively prescribed malt liquors, particularly beer of average Alcohol Content of 4 to 4½% by weight, not only to my patients but in my own family during my twenty (20) years of active practice.

88      I have found beer to be a very valuable remedial agent and have prescribed it in wasting diseases, in post-operative cases, in cases of digestive disturbance, as a tissue builder generally, and as an invigorating stimulant. I have found that not only adults but children bear such stimulants well. A glass of good beer actually stimulates the appetite, invigorates the system and, hence, acts as agent introducing into the body an increased supply of nutriment.

Moreover, good malt liquors, when containing the bitter principle of the hops, act as appetizers, aid digestion and promote sleep. These qualities make beer of important value in certain forms of dyspepsia, in debility, particularly when induced by neuralgia, over-exertion, worry and like diseases.

The considerable food-stuffs present in beer and generally absent in higher alcoholics, make beer an ideal agent therapeutically. It combines curative properties in its body-building substances which are both easily assimilated and have a pronounced advantage, in the slight laxative effect of beer where there is a tendency to constipation.

Beer is a very valuable and important medicinal agent and finds wider application than any other alcoholic. It is for that reason invaluable as a medicinal adjunct. (Sgd.) William J. Mathews, M. D.

Sworn to before me this 20th day of December, 1921. (Sgd.) Edward Bullwinkel, Notary Public, etc.

89      United States District Court, Southern District of New York.

[Title omitted.]

**Affidavit of Curt E. H. Nicolai.**

STATE OF NEW YORK,  
*City of New York,*  
*County of New York, ss:*

Curt E. H. Nicolai, being duly sworn, deposes and says:  
I reside at 81 West 119th Street, New York City, New York, and  
have my office at the same address.

I am a graduate of the Royal University of Leipzig, Germany,  
and have been in practice since 1881. I started my practice in New  
York City in 1882 and have ever since practiced here.

During these forty (40) long years of my general medical  
90      practice, I have found beer a very valuable remedy in innu-  
merable cases and of great help in building up patients in  
strength and energy after serious diseases.

I consider beer one of the best remedies for sleeplessness and a  
very valuable tonic for adults and children.

It is of very great benefit to nursing mothers. It is invaluable in  
convalescence and in debility, whether in children or in grown  
people. I have found beer to obtain very satisfactory results in all  
cases where I have prescribed it. (Sgd.) Curt E. H. Nicolai, M. D.

Sworn to before me this 19th day of December, 1921. (Sgd.) E.  
B. French, Notary Public, etc.

91      United States District Court, Southern District of New York.

[Title omitted.]

**Affidavit of Antonio Arbona, M. D.**

STATE OF NEW YORK,  
*City of New York,*  
*County of Kings, ss:*

Antonio Arbona, M. D., being duly sworn, deposes and says:

I reside at one thirty (130) Pennsylvania Avenue, in the Bor-  
ough of Brooklyn, New York City, N. Y.

I am a graduate of the Long Island College Hospital, New York,  
class 1887, and have been practicing ever since.

During my professional life I have prescribed for my patients  
both wines and beers with very apparent beneficial results.

I regard good beer as a mild hypnotic which, taken before re-  
tiring, in proper cases, secures quiet and refreshing sleep. It  
92      is a valuable digestant for under-fed children and, by its bit-

ter hop principal, is particularly valuable in supplying a relatively large amount of nutrition in fluid and easily-assimilated form. In conditions, just short of good health, in old age, in conditions due to overwork and fatigue, the beneficial effects of good beer are most marked. It is more beneficial than spirits in stimulating the body, promotes digestion, gives a relish to food, increase appetite and promotes the flow of saliva. It is very useful in convalescence and for those enfeebled by chronic diseases, and the aged. It is a boon to those whose stomach has lost tone by overwork, rush and worry, and to sufferers from sleeplessness and neuralgia.

I pray that in future I may be able to use beer again, and know that I have lost a very valuable medicinal agent by the denial of the prescription of beer through prohibition laws. (Sgd.) Antoni Arbona, M. D.

Sworn to before me this 19th day of December, 1921. (Sgd.) Chas. Alt, Notary Public, etc.

93 United States District Court, Southern District of New York

[Title omitted.]

**Affidavit of Joseph Samenfeld, M. D.**

STATE OF NEW YORK,  
City of New York,  
County of Kings, ss:

Joseph Samenfeld, M. D., being duly sworn, deposes thus:

I reside and maintain offices at 122 Pennsylvania Avenue, in the Borough of Brooklyn, New York City.

I graduated from the Bellevue Hospital Medical School of New York City (Medical Branch of New York University) in 1902, and have since been engaged in the general practice of medicine.

I hereby certify that beers and other malt liquors, as brewed prior to the enactment of the 18th Amendment, were digestants and tonics, absolutely harmless, as the contained alcohol therein was in such dilution as to be non-injurious, and of very great medicinal value as tissue-builders and body-invigorants.

I have found beer throughout the entire use of my practice as an invaluable remedy in cases of debility following upon protracted illness, as an irreparable agent in increasing the flow and quality of mothers' milk during lactation, and as a tonic superior to all others in cases of mild gastric disorders or the milder stomach diseases. I know of nothing that will, while benefiting the patient, be a specific in certain cases, at the same time promote and accelerate recovery and convalescence as good beer has done for my patients. I regard it as invaluable after prolonged diarrhoea. I regard it as superior and of very great benefit following after typhoid, typhus pneumonia, in anemia, for individuals who are under weight, and in fact in all cases of debility brought on by wasting diseases.

I have found it a blessing to the patient in supplying nourishment in prolonged cases due to ulcers of the stomach.

It is an excellent soporific in proper cases, accomplishing a two-fold purpose, that of sound sleep and a reinvigoration of the body which generally suffers from insomnia.

The results obtained by me in the prescription of good beer have been wholly satisfactory. (Sgd.) Joseph Samenfeld, M. D.

Sworn to before me this 20th day of December, 1921. (Sgd.)  
Chas. Alt, Notary Public, etc.

95 United States District Court, Southern District of New York.

[Title omitted.]

**Affidavit of A. F. Zahn.**

STATE OF NEW YORK,  
*City of New York,*  
*County of Kings, ss:*

A. F. Zahn, being duly sworn, deposes as follows:

I reside and maintain an office at 747 Green Avenue, Brooklyn, N. Y., and have been in the general practice of medicine since 1887, when I graduated from Bellevue Hospital Medical College, New York.

I have, during the entire period of my practice until the advent of Prohibition, prescribed beer largely in cases for aged people and patients suffering from nervous breakdown or loss of sleep, beer having greatly benefitted such patients in aiding digestion, 96 quieting the nervous system and inducing sound sleep.

I have always preferred beer as a soporific to induce sleep, other narcotics having been found by me to be more harmful than good pure beer. It has proven in my practice to be invaluable as a galactagogue. I have living many patients who suffered from tuberculosis and who owe their restoration to health to the tissue-building power of fermented malt liquors prescribed by me for them which, giving them readily assimilated food, improved their blood, added weight and healed their lungs.

Beer has served my patients in many other instances and diseases, and I consider it a remedy for which, in many cases, there is no adequate substitute. (Sgd.) Anthony F. Zahn, M. D.

Sworn to before me this 21st day of December, 1921. (Sgd.)  
Edgar A. Netherclift, Com. of Deeds, etc.

97      United States District Court, Southern District of New York

[Title omitted.]

**Affidavit of C. T. Graham-Rogers.**

**STATE OF NEW YORK,**  
*City of New York,*  
*County of Kings, ss:*

C. T. Graham-Rogers, being duly sworn, deposes and says:  
I reside at Tottenville, Staten Island, and am a graduate from the Baltimore University School of Medicine (1899), and have been active in the general practice of medicine for twenty-one years.

I am the State Medical Inspector of Factories for the State of New York; and Surgeon to the 27th Division Train. I opened up the New York Department of Health Clinic for Pulmonary Diseases, i. e., Tuberculosis, in 1902, and have, in the past, acted in the capacity of attending physician at governmental clinics, where I have given special attention to Gastro-Intestinal Diseases.

98 & 99      I regard beer, comprising ale, stout, porter, lager and malt tonics, as a very valuable remedy that combines the properties of food and medicine to a degree not shared by any other medicinal agent.

During the course of my practice, I have prescribed liquors, spirits, wine and beer, generally, but have found beer to be of far greater service than any of the other alcoholics.

Beer is an excellent stomachic and is particularly valuable for its mild laxative properties. It is of far greater service than other drugs that might be used in substitute thereof in specified cases, because it combines a valuable food with its medicinal properties. It is exceedingly valuable in all cases where properly used. I have found it of particular benefit in the treatment of pulmonary diseases as a body and tissue builder, checking the waste of tissue, and rebuilding the body and thereby contributing to the restoration of the health of patients infested with tuberculosis.

As there is no substitute for beer in proper cases, it should be restored to the service of the medical profession. (Sgd.) C. T. Graham-Rogers.

Sworn to before me this 21st day of December, 1921. (Sgd.)  
John A. Leavens, Notary Public, etc.

**STATE OF NEW YORK,**  
*County of New York, ss:*

Samuel Dana Hubbard, M. D., Director of the Bureau of Public Health Education, New York City Department of Health being duly sworn deposes and says:

I am a citizen of the United States, over twenty-one years of age, and reside at Freeport, New York, in the State of New York.

That it is my conviction that beer, as the term is now used in general usage, is not recognized as a medicine and it has no standing in the U. S. Pharmacopeia. So far as my knowledge and opinion go, it is my impression that beer and alcoholic extract of malt, hops and other vegetable materials, with at times a varying content of alcohol, has been used by different members of the medical profession in their general practice, and I personally myself have done so in a number of instances; but I do not consider that there is no substitute for this agent. On the other hand, when I consider the harm that has been done through the promiscuous sale and ingestion of beer indiscriminately, I appreciate and am of the opinion that more harm has been done by the use of beer on the part of citizens without medical direction than good has been done under the advice of the medical profession, through the use of beer.

The national inhibition of the use of beer has not, in my estimation, embarrassed my practice for the reason that I am aware of other agents in our pharmacopeia that can readily displace this agent without its accompanying dangers through indiscriminate use of the same. (Signed) S. Dana Hubbard, M. D.

Subscribed and sworn to before me this 5th day of January, 1922. Thomas G. Rocks, Comm. of Deeds, 200. Exp. 7-17-22.

101                   **Affidavit of Arthur M. Shipley.**

Arthur M. Shipley, M. D., 1827 Eutaw Place, Baltimore.

12-29-21.

I do not believe that beer has any value as a therapeutic agent in the treatment of disease, and I am strongly opposed to putting the responsibility for the dispensation on the Medical Profession. (Signed) Arthur M. Shipley.

Subscribed and sworn to before me this 29th day of December, 1921. Eleanor L. Muhly, Notary Public.

102                   **Affidavit of J. G. Vaughan.**

STATE OF NEW YORK,

*County of New York, ss:*

J. G. Vaughan, M. D. being duly sworn, deposes and says: I am a citizen of the United States, over twenty-one years of age, and reside in New York City.

That it is my conviction that beer, as the term is now understood in general usage, is not a medicine and is not, nor has it ever been, in the pharmacopeia. (Signed) J. G. Vaughan.

Subscribed and sworn to before me this 5th day of January, 1922. Arthur A. Atha, Notary Public, N. Y. County. Co. Clerk 225.

103

**Affidavit of A. C. Prentiss.**

**STATE OF NEW YORK,**  
*County of New York, ss:*

A. C. Prentiss, M. D. being duly sworn deposes and says:

I am a citizen of the United States, over twenty-one years of age, and reside at 226 West 78th Street, New York City.

That it is my conviction that beer, as the term is now understood in general usage, is not recognized as a medicine and it has no standing in the pharmacopœia. (Signed) Alfred C. Prentice.

Subscribed and sworn to before me this 4th day of January, 1922.  
Arthur A. Atha, Notary Public, N. Y. County. Co. Clerk 225.

104

**Affidavit of Alexander Lambert.**

**STATE OF NEW YORK,**  
*County of New York, ss:*

Alexander Lambert, M. D. being duly sworn, deposes and says:

I am a citizen of the United States, over twenty-one years of age and reside in New York City.

That it is my conviction that beer, as the term is now understood in general usage, is not a medicine and it has never been in the pharmacopœia, nor is it here at present although other alcoholic solutieres used as beverages have been and are at present in the pharmacopœia. (Signed) Alexander Lambert, M. D.

Subscribed and sworn to before me this 6th day of January, 1922.  
Arthur A. Atha, Notary Public, N. Y. County. Clerk 225.

105

**Affidavit of H. G. Myers.**

**STATE OF NEW YORK,**  
*County of New York, ss:*

H. G. Myers, M. D. being duly sworn, deposes and says:

I am a citizen of the United States, over twenty-three years of age, and reside at 153 West 78th Street, New York City.

That it is my conviction that beer, as the term is now understood in general usage, is not recognized as a medicine and it has no standing in the pharmacopœia. (Signed) H. G. Myers, M. D.

Subscribed and sworn to before me this 4th day of January, 1922.  
Arthur A. Atha, Notary Public, N. Y. County. Co. Clerk 225.

**Affidavit of D. S. Dougherty.**

STATE OF NEW YORK,  
*County of New York, ss:*

D. S. Dougherty, M. D. being duly sworn deposes and says:

I am a citizen of the United States, over twenty-one years of age, and reside at 111 West 85th Street, New York City.

That it is my conviction that beer as the term is now understood in general usage, is not recognized as a medicine and it has no standing in the pharmacopœia. (Signed) D. S. Dougherty.

Subscribed and sworn to before me this 4th day of January, 1922.  
Arthur A. Atha, Notary Public, N. Y. County. Clerk 225.

**Affidavit of John McCabe.**

STATE OF NEW YORK,  
*County of New York, ss:*

John McCabe, M. D. being duly sworn, deposes and says:

I am a citizen of the United States, over twenty-one years of age, and reside at 348 Central Park West, New York City.

That it is my conviction that beer, as the term is now understood in general usage, is not recognized as a medicine and it has no standing in the pharmacopœia. (Signed) John McCabe.

Subscribed and sworn to before me this 4th day of January, 1922.  
Arthur A. Atha, Notary Public, N. Y. County. Co. Clerk 225.

[Title omitted.]

**Stipulation Waiving Printing Congressional Record.**

It is hereby stipulated that the printed extracts from the congressional record, and the various copies of the congressional record offered by the Government in opposition to the motion for injunction and in favor of the motion to dismiss, need not be printed in the transcript of record in the United States Supreme Court, but that the originals now on file in the office of the Clerk of this Court may be submitted with the same force and effect as though the same were printed in the transcript of record.

Dated, New York, December 29, 1922.    Olcott, Bonynge, Manus & Ernst, Solicitors of Complainant.    Wm. Hayward, U. S. Attorney, Solicitor of Defendants.

109      United States District Court, Southern District of New York

[Title omitted.]

**Order Denying Temporary Injunction, etc.**

This cause came on to be heard at a term of this court and was argued by counsel and thereupon on consideration thereof, it was Ordered, adjudged and decreed as follows, viz:

That the motion on behalf of the complainant for preliminary injunction restraining the defendants from enforcing the provisions of the act of Congress of November 23, 1921, be and the same hereby is in all respects denied.

That the motion of the defendants that the complaint herein be dismissed be and the same hereby is granted.

That the defendants have judgment against the plaintiff for their costs to be taxed.

Dated, New York, February 23rd, 1922. L. Hand, U. S. D. J.

110      District Court of the United States, Southern District of New York.

[Title omitted.]

**Final Judgment.**

The complainant in the above entitled cause filed its bill of complaint on the 12th day of December, one thousand nine hundred and twenty-one and the writ of subpoena was thereupon issued, and returned personally served.

An appearance was duly entered for the defendants by William Hayward, solicitor.

On January 25, 1922, an order was filed correcting the title of this action by striking out the H in the name of William H. Hayward and by adding as a party defendant David H. Blair as Commissioner of Internal Revenue and on the same date an amended bill of complaint was filed. On February 21, 1922, an appearance was duly entered for David H. Blair as Commissioner of Internal Revenue.

Afterwards, and at the February term 1922 of said Court, present the Honorable Learned Hand, the said cause came on to be heard on the pleadings and proofs, and was argued by counsel. On February 6, 1922, a motion was filed to dismiss the bill of complaint and on February 17, 1922, said motion was granted.

On the 23rd day of February, one thousand nine hundred 111 and twenty-two, the said Court caused its final decree to be entered herein, by which it was adjudged that the complaint be dismissed and that the defendants have judgment against the plaintiff for their costs to be taxed the same being annexed hereto.

And the costs having been taxed by the clerk at Twenty-five and

30/100 (\$25.30) dollars, the process, pleadings, and decrees together with other papers filed in said cause, are duly annexed hereunto.

Wherefore, let the said Ralph P. Day, Federal Prohibition Director for the State of New York, Frank K. Bowers, Collector of Internal Revenue for the Second District of New York, William Hayward, U. S. Attorney and David H. Blair, Commissioner of Internal Revenue recover of said James Everard's Breweries the sum of Twenty-five and 30/100 (\$25.30) dollars, the cost and charges as taxed. Signed and enrolled this 28th day of February A. D. 1922. Alex Gilchrist, Jr., Clerk.

112 United States District Court, Southern District of New York.

[Title omitted.]

**Petition for Appeal and Order Allowing Same.**

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

James Everard's Breweries, by its solicitors, Olcott, Bonyngé, McManus & Ernst, feeling aggrieved by the final decree rendered and entered in the above entitled cause on the 23rd day of February, 1922, which decree dismissed the complaint, and in which case there was involved a constitutional question arising under the Constitution of the United States, does hereby appeal from said decree to the Supreme Court of the United States, for the reasons specified in the assignments of error hereto annexed, and filed herein, and prays that this appeal be allowed, and that a citation be issued, as provided by law, and that a transcript of the record and proceedings, and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States, sitting at Washington, D. C., under the rules of such Court, in such cases made and provided, and your petitioner further prays that the proper order relating to the required security to be required if it be made.

113 Dated, New York, March 22nd, 1922. Olcott, Bonyngé, McManus & Ernst, Solicitors for Complainant-Appellant.

Appeal allowed upon giving bond as required by law, for the sum of \$250.

Dated, New York, March 23, 1922. Jno. C. Knox, U. S. District Judge.

**114      District Court of the United States of America for the Southern District of New York, in the Second Circuit.**

[Title omitted.]

**Bond on Appeal.**

Know all men by these presents, that James Everard's Breweries, as principal, and National Surety Company, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City, County and State of New York, as surety, are held and firmly bound unto the above named Ralph A. Day, Federal Prohibition Director of the State of New York, and others, etc., in the sum of Two hundred and fifty (\$250) dollars to be paid to the said Ralph A. Day, Federal Prohibition Director of the State of New York, and others, etc., for the payment of which well and truly to be made said principal and surety bind themselves, their heirs, executors, administrators and assigns, jointly and severally, firmly by these presents. Sealed and dated the 24th day of March, 1922.

Whereas, the above named James Everard's Breweries, has prosecuted an appeal to the Supreme Court of the United States, to reverse the final judgment, and entered in the above entitled suit, by  
**115      a Judge of the District Court of the United States for the Southern District of New York.**

Now, therefore, the condition of this obligation is such, that if the above named James Everard's Breweries, shall prosecute said appeal to effect, and answer all damages and costs if it fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue. James Everard's Breweries, By Daniel M. Tracy. National Surety Company, By Roy B. Davis, Resident Vice-President. Attest: R. V. Tynan, Resident Assistant Secretary.

**116      *Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.***

**STATE OF NEW YORK,**  
*County of New York, ss:*

On this 24th day of March, 1922, before me personally came Roy B. Davis, known to me to be the Resident Vice-President of the National Surety Company, the corporation described in and who executed the foregoing bond of James Everard's Breweries, as surety and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly incorporated under the laws of the State of New York, that said Company has complied with the provisions of the Act of Congress of August 13, 1894, that

the seal affixed to the within Bond of James Everard's Breweries, is the corporate seal of said National Surety Company, and was thereto affixed by authority of the Board of Directors of said Company, and that he signed his name thereto by like authority as Resident Vice-President of said Company, and that he is acquainted with N. V. Tynan, and knows him to be the Resident Assistant Secretary of the Company; and that the signature of said N. V. Tynan, subscribed to the said Bond is in the genuine handwriting of said N. V. Tynan, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of Ten Million dollars. Roy B. Davis. Deponent's Signature.

Signed, sworn to, and acknowledged before me this 24th day of March, 1922. H. E. Hasett, Notary Public, &c.

STATE OF NEW YORK,  
*County of New York, ss:*

On this 27th day of March, 1922, before me personally came Daniel M. Tracy, to me known, who being duly sworn, did depose and say that he resides in Borough of New York, City of New York; that he is the Treasurer of the James Everard's Breweries, the corporation described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of the said corporation, and that he signed his name to the said instrument by like order. Thos. J. Gorvin, Notary Public. (Seal of Notary.)

117 United States District Court, Southern District of New York.

[Title omitted.]

### Assignments of Error.

Comes now the complainant, James Everard's Breweries, and files the following assignments of error, upon which it will rely upon this appeal from the final decree made by this Honorable Court on the 23rd day of February, 1922, in the above entitled cause:

First. The Court erred in denying the motion for preliminary injunction restraining the defendants from enforcing the provisions of the Act of Congress of November 23, 1921, this assignment of error being taken as incidental to the provision in said decree dismissing the complaint.

Second. The Court erred in not granting said motion for injunction as against all of the defendants specified in the bill of complaint.

Third. The Court erred in granting the motion of the defendants to dismiss the complaint, and in granting a final decree of dismissal,

Fourth. The Court erred in adjudging that Section 2 of the Act of November 23, 1921, supplemental to the National Prohibition Act, popularly designated as the Willis-Campbell Act, was constitutional.

118 Fifth. The Court erred in failing to hold that said Act, aforesaid, and particularly Section 2 thereof, was unconstitutional.

Sixth. The Court erred in failing to grant to the complainant, the relief prayed for in the bill of complaint.

Seventh. The Court erred in holding that Congress was justified in the furtherance of the Eighteenth Amendment to the Federal Constitution, to enact legislation which prohibited physicians from prescribing, permittee druggists from selling, and brewers from making intoxicating malt liquors for use for medicinal purposes under proper governmental regulations.

Eighth. The Court erred in holding that Congress was within its constitutional prerogatives in enacting so much of the Willis-Campbell Act as forbade brewers to make, physicians to prescribe, and permittee druggists to sell intoxicating malt liquors for use for medicinal purposes, under proper governmental regulations.

Ninth. The Court erred in holding that Congress was the sole judge of its acts as to the reasonableness of the legislation pertaining to the enforcement of National Prohibition, and the National Prohibition Laws.

Wherefore, Complainant-Appellant prays that the final decree of said court may be reversed, and in order that the foregoing assignments of error may be made a part of the record, the Complainant-Appellant presents the same to the Court, and prays that such disposition may be made thereof as is in accordance with the law and the statutes of the United States in such case made and provided. O'Leary, Bonynge, McManus & Ernst, Solicitors for Complainant-Appellant, James Everard's Breweries.

By John C. Knox, one of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit, to Ralph A. Day, Federal Prohibition Director of the State of New York; Frank K. Bowers, Collector of Internal Revenue for the Second District of New York; William Hayward, United States Attorney for the Southern District of New York, and David H. Blair, as Commissioner of Internal Revenue, Greeting:

You are hereby cited and admonished to be and appear before the United States Supreme Court at Washington, District of Columbia, on the 22nd day of April, 1922, pursuant to an appeal filed in the Clerk's office of the District Court of the United States, for the Southern District of New York, wherein James Everard's Breweries is the Appellant and you are the Appellees, to show cause, if any there be,

why the final decree in said appeal mentioned should not be corrected and reversed, and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 23rd day of March, in the year of our Lord, one thousand nine hundred and twenty-two, and of the Independence of the United States the One Hundredth and Forty-sixth, Jno. C. Knox, Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

120    United States District Court, Southern District of New York.

[Title omitted.]

**Stipulation as to Transcript.**

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties, consisting of the following papers:

1. Subpoena.
2. Amended complaint.
3. Order.
4. Stipulation providing that extracts from congressional record or of testimony before Committee of Congress may be used as though statements were contained in affidavit form.
5. Notice of motion for preliminary injunction.
6. Notice of motion to dismiss complaint.
7. Affidavits of physicians on behalf of complainant.
8. Affidavits of physicians on behalf of defendants.
9. Order granting motion for final judgment.
10. Final Judgment.
11. Notice of appeal, and order allowing appeal.
12. Bond on appeal.
13. Assignments of errors.
14. Citation to the U. S. District Court.
15. Stipulation waiving printing of extracts from congressional record and copy of congressional record.
16. Order entered on said stipulation.
17. Stipulation as to correctness of appeal record.
18. Certificate of Clerk.

Dated New York, January 3, 1923. Oleott, Bonynge, McManus & Ernst, Solicitors of Complainant. Wm Hayward, U. S. Atty., Solicitor of Defendants.

121    UNITED STATES OF AMERICA,  
*Southern District of New York, ss:*

In Equity. E-22-328.

JAMES EVERARD'S BREWERIES, Complainant,  
 vs.

RALPH A. DAY, Federal Prohibition Director for the State of New York; Frank K. Bowers, Col. of Internal Revenue for the See Dist. of New York; William Hayward, U. S. Attorney, and David H. Blair, as Comm. of Int. Revenue, Defendants.

**Clerk's Certificate.**

I, Alexander Gilechrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 3rd day of January in the year of our Lord one thousand nine hundred and Twenty-three and of the Independence of the said United States the one hundred and forty-seventh. Alex. Gilechrist, Jr., Clerk. [Seal of District Court of the United States, Southern District of New York.]

Endorsed on cover: File No. 29,351. S. New York D. C. U. S. Term No. 801. James Everard's Breweries, appellant, vs. Ralph A. Day, Prohibition Director of the State of New York, et al. Filed Jany. 18th, 1923. File No. 29,351.

122    United States District Court, Southern District of New York

[Title omitted.]

**Stipulation as to Service of Citation.**

[Filed Jan. 24, 1923.]

It is hereby stipulated that there be added to the record in the United States Supreme Court, at the foot of the citation, the words "due and timely service of a copy of the within admitted. Dated March 24, 1922." William Hayward, U. S. Attorney. Oleott, Bonynge, McManus & Ernst, Solicitors for Complainants. Wm. Hayward, U. S. Attorney, Solicitor for Defendants. Dated New York, January 23, 1923.

123    [File endorsement omitted.]

R<sub>t</sub>

Office Supreme Court, U. S.  
FILED  
OCT 27 1923

WM. R. STANSBURY

# Supreme Court of the United States

OCTOBER TERM, 1923—No. 200.

JAMES EVERARD'S BREWERIES,  
*Complainant-Appellant,*  
*against*

RALPH A. DAY, Prohibition Director of the State of New York, FRANK K. BOWERS, Collector of Internal Revenue for the Second District of New York, WILLIAM HAYWARD, United States Attorney, and DAVID H. BLAIR, as Commissioner of Internal Revenue,

*Defendants-Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT,  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

---

## APPELLANT'S BRIEF.

---

WILLIAM M. K. OLcott,  
WALTER E. ERNST,  
NATHAN BALLIN,  
Of Counsel for Appellant.

---

---



## **INDEX.**

---

	PAGE
Introductory Statement .....	1
Statement of Facts as to the Issues in this Case .....	3
Assignments of Error.....	7
Preface to Points.....	8
POINT I—The Eighteenth Amendment to the Federal Constitution prohibited the use of Intoxicating liquors for Beverage Purposes Only. ....	10
POINT II—The States by the Eighteenth Amendment did not delegate to Congress the Power to Regulate Health. The Complete Suppression of Malt Liquors for Medicinal Purposes Infringes upon such State Power. ....	17
POINT III—The Prohibition of Intoxicating Malt Liquors for Medicinal Purposes is Neither an Appropriate nor a Reasonable Exercise of the Prohibitory Power of Congress. ....	30
Conclusion .....	40

**Table of Cases.**

PAGES	
Bailey v. Drexel Furniture Co., 259 U. S. 20	20
	25, 26
Bayer v. U. S., 251 Fed. 35.....	25
Congressional Record—67th Congress, P. 9038	32
Dent v. W. Va., 129 U. S. 114.....	26
Falstaff v. Allen, 278 Fed. 643.....	2, 7
Freund on Police Power (Page 210).....	34
Hammer v. Dagenhart, 247 U. S. 251.....	26
Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U. S. 146.....	13, 15
Hoke v. U. S., 227 U. S. 308.....	23, 24
Huffman v. U. S., 259 Fed. 235.....	25
Jacobson v. Massachusetts, 197 U. S. 11....	26
Keller v. U. S., 213 U. S. 138.....	23, 24
Lambert v. Yellowley, 291 Fed. 640....3, 34,	35
Marshall v. Gordon, 243 U. S. 521.....	21, 22
McCulloch v. Maryland, 4 Wheaton 316....	31
Opinion—Attorney General Palmer...11, 12,	13
People v. Cole, 219 N. Y. 98.....	27, 28
Piel v. Day, 278 Fed. 223; 281 Fed. 1022	2, 7, 17, 18
Prigg v. Pennsylvania, 41 U. S. 539.....	17
Purity Extract Co. v. Lynch, 226 U. S.	
192 .....	18, 19
Rhode Island v. Palmer, 253 U. S. 350..13,	14
Ruppert v. Caffey, 251 U. S. 264..13, 14, 15,	18
Sarrls v. Commonwealth, 83 Ky. 427.....	33
Simpson v. U. S., 245 Fed. 278.....	25
Street v. Lincoln Safe Deposit Co., 254	
U. S. 88.....	16
United States v. Doremus, 249 U. S. 86....	27
United States v. Freund, 290 Fed. Rep. 411	3
Watson v. Maryland, 218 U. S. 173.....	26

# Supreme Court of the United States

OCTOBER TERM, 1923—No. 200.

JAMES EVERARD'S BREWERIES,  
Complainant-Appellant,

against

RALPH A. DAY, Prohibition Director of the State of New York,  
FRANK K. BOWERS, Collector of Internal Revenue for the Second District of New York, WILLIAM HAYWARD, United States Attorney, and DAVID H. BLAIR, as Commissioner of Internal Revenue,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

## APPELLANT'S BRIEF.

### Introductory Statement.

This is an appeal from the Final Decree of Honorable Learned Hand, United States District Judge, dismissing the bill of complaint, which decree was entered February 25, 1922 (Record, fols. 110-112, pp. 58 and 59).

Prior to the entry of the decree, the Court had made an order denying the motion for a

preliminary injunction, and directing that the motion of the defendants to dismiss the complaint be granted (Record, p. 58, fol. 109).

The issues presented on this appeal directly involve a constitutional question, namely, the construction of Section 2 of the Act Supplemental to the National Prohibition Law, passed on November 23, 1921, commonly known as the Willis-Campbell Act.

There have been four actions instituted to test the validity of this Act,—the first *Falstaff v. Allen*, arose on a motion for a preliminary injunction before Judge Faris in the District Court of Missouri. The opinion is reported in 278 Fed. Reporter 643; the second, *Piel v. Day*, was brought in the United States District Court, Eastern District of New York. A motion for a preliminary injunction was argued before Judge Garvin and denied. His opinion is reported in 278 Fed. Reporter 223.

The order of Judge Garvin denying the motion for preliminary injunction was taken to the United States Circuit Court of Appeals in the Second District, and there argued, and that Court affirmed Judge Garvin without opinion. A memorandum of the decision of the Circuit Court of Appeals appears in 281 Fed. Reporter 1022.

The *Piel* case was brought before this Court on an appeal from this order, and it was agreed by counsel that it should be passed and brought before the Court at the same time as the case at bar.

The third is the instant case.

The fourth case was that of *E. & J. Burke, Ltd. v. Blair*, decided by Judge Knox in the United

States District Court, Southern District of New York, who wrote a short opinion following the decisions in *Falstaff v. Allen*, and *Piel v. Day*.

*Burke v. Blair* also will probably be before this Court at the same time as the present case.

The precise question involved in this appeal has not, as yet, been decided in this Court. Certain phases of the Willis-Campbell Act have been construed in two recent decisions,—one by Judge Knox in *Lambert v. Yellowley*, decided in the United States District Court, Southern District of New York, which held that portion of the act limiting the number of prescriptions to be given by a physician, to be unconstitutional. This decision was later followed by Judge Bourquin in the District of Montana who made a similar ruling in the case of *United States v. Freund*. These decisions are reported as follows:

*Lambert v. Yellowley*, 291 Fed. Rep. p. 640.

*United States v. Freund*, 290 Fed. Rep. p. 411.

#### **Statement of Facts as to the Issues in This Case.**

This action, brought for an injunction to restrain the enforcement of the provisions of the Willis-Campbell Act, was based upon the amended bill of complaint, together with the supplements thereto, and upon the various affidavits of physicians which are annexed to the Record.

The epitomé of the amended complaint is as follows:

It is alleged that complainant is a brewery organized in 1895, and that it has its place of

business at 133d Street and Madison Avenue, Borough of Manhattan, City of New York, and that it has a valuable plant (Record, p. 3).

Then are set forth the enactment of the Eighteenth Amendment to the Constitution of the United States, and of the National Prohibition Act, and there appear in the complaint such definitions as are valuable relative to the phraseology with which we are concerned, and especially (p. 6) the regulations for the manufacture and dealing in liquor for non-beverage purposes.

There is further pleaded the promulgation of Regulations 60, by the Secretary of the Treasury, which provided an elaborate permit system for dealing in alcoholic liquors not to be used for beverage purposes (Record, p. 51).

There is further set forth, the opinion of Attorney General Palmer rendered on March 3, 1921, at the instance of the Secretary of the Treasury, whereby the Attorney General expressed the view that it was not within the purview of the Eighteenth Amendment to prohibit the manufacture of liquors for medicinal purposes, and that the Eighteenth Amendment contained no such prohibition (Record, pp. 6 and 7). Thereafter, on or about October 24, 1921, the Commissioner of Internal Revenue amended the regulations, and especially Regulations 60, and in relation to the brewing of intoxicating malt liquors for medicinal purposes, provided a system of permits by which this could be done. Acting under these regulations, the complainant gave a bond for \$25,000 and applied for permits (Complaint, paragraphs XVI and XVII, p. 7).

Thereafter, the complainant complied with all the regulations of the Collector of Internal Rev-

enuie in respect to the payment of taxes, and did all things necessary for the brewing of malt liquors, and had actually brewed 900 barrels when the Act Supplemental to the National Prohibition Law, passed on November 23, 1921, became effective, whereby the sale of this intoxicating malt liquor for medicinal purposes was rendered illegal. The complainant was unable to dispose of its product except by de-alcoholizing, which would necessitate a great financial loss (Record, p. 8).

The amended complaint further sets forth the rights of the complainant in respect to co-operation with physicians and pharmacists relative to the manufacture and sale of malt intoxicating liquors for medicinal purposes, and the injury which it has sustained by the enactment of the Act of November 23, 1921 (Record, pp. 10 and 11). The amended complaint prays for a restraining order and injunction against the respective defendants (Record, pp. 14 and 15).

There are annexed to the amended bill, Exhibit A, The Eighteenth Amendment to the Constitution (Record, pp. 15 and 16); Exhibit B, Treasury Decision 3239 (Record, pp. 16 to 21 inclusive). This decision extended the regulations for the manufacture of intoxicating malt liquors for medicinal purposes, and followed the opinion of Attorney General Palmer.

Exhibit C is a letter from the Treasury Department giving more precise directions as to methods to be pursued in brewing intoxicating malt liquors (Record, pp. 21 and 22).

Exhibits D and E are the permits issued to the complainant (Record, pp. 22 to 24).

Exhibit F is an exact copy of the Supplemental Law, the Willis-Campbell Act, as to which Section

2, and particularly the first sentence thereof, are in question in this attack on the constitutionality of that Act.

In addition to the amended complaint, there appear in the Record many affidavits of physicians which detail their opinion relative to the therapeutic value of intoxicating malt liquors for medicinal purposes. These, briefly digested, attribute the following valuable medicinal properties to intoxicating malt liquors, to wit:

- (1) They are beneficial to the aged and infirm.
- (2) They are valuable for children who suffer from malnutrition and for rickety children.
- (3) They are valuable as a galactogogue, that is, for use by nursing mothers, during the period of lactation.
- (4) They often tend to increase the appetite and stimulate the gastric secretion, and aid in digestion.
- (5) In cases of insomnia, when taken before retiring, they are valuable aids in producing satisfactory sleep, and act in such cases as a useful sedative.

It is to be observed that the District Court in the instant case did not render an opinion, and did not pass upon the therapeutic properties of intoxicating malt liquors, and this is still an open question to be determined as a question of fact in the event of reversal and a trial of the issues before the Court below.

The dismissal of the complaint rested solely upon constitutional grounds, and there is not, in

any of the opinions which have been reported, an adjudication as to whether or not intoxicating malt liquors possess the medicinal properties which are claimed for them in this action.

The opinion of Judge Garvin in *Piel v. Day*, recites the fact that the complainant in that action, as in the instant case, bitterly disputed the decision of Congress in having summarily held that intoxicating malt liquors did not possess medicinal properties. (See 278 Fed., at page 226).

In *Falstaff v. Allen*, decided by Judge Faris, 278 Fed. 643, the issue as to the medicinal property of alcoholic malt liquors was not raised, and it is so stated in the opinion, page 644.

We therefore approach the consideration of this appeal, with the proposition vitally presented, that Congress has in its discretion summarily determined that malt liquors do not possess medicinal properties, and has assumed to declare this as a scientific fact. Congress has eliminated by the Willis-Campbell Act, the privilege previously enjoyed by breweries of assisting the medical profession, in supplying these intoxicating malt liquors for medicinal purposes, to permittee druggists, for distribution.

#### **Assignments of Error.**

It is asserted by the assignments of error (Record, pages 61 and 62), that the Court below erred in failing to grant a preliminary injunction, in dismissing the bill of complaint, in failing to hold Section 2 of the Act Supplemental to the National Prohibition Act to be unconstitutional,

and erred further, in holding that Congress was justified from a constitutional standpoint, in enacting legislation which prohibited the manufacture, by breweries, of intoxicating malt liquors, and which likewise forbade physicians to prescribe, and druggists to sell, such intoxicating malt liquors under proper permits, and likewise, that the Court below erred in holding that Congress was the sole judge of its acts as to the reasonableness of legislation pertaining to the enforcement of the National Prohibition Law.

These assignments of error embodied in the said specifications and summarized above, present the crux of the questions involved, namely, whether in the enforcement of National Prohibition, Congress may so legislate as to decide by its declaratory power what is, or is not, fitted for medicinal use, and thereby so extend the Eighteenth Amendment, in order to affect the prohibition for beverage purposes, by eradicating also the use of malt liquor, previously valid for medicinal purposes.

#### **Preface to Points.**

There are four fundamental propositions involved in this appeal, to be discussed in the three points of this brief, which we assert render Section 2 of the Willis-Campbell Act unconstitutional. These are summarized as follows:

- (1) Because it is destructive of the personal liberty of the physician to prescribe and of the patient to be treated in such manner as the physician, from his knowledge and experience, deems best for the patient.

(2) Because it is an unwarrantable interference and destruction of the right of breweries to co-operate with physicians, patients and druggists in the manufacture and sale of intoxicating malt liquors for medicinal purposes, a use never prohibited by the Eighteenth Amendment.

(3) Because the attempt of Congress to make such an enactment is not within its powers, as contravening that portion of the Federal Constitution which limits to Congress the express powers delegated to it, and expressly reserves to the states those powers not delegated.

(4) Because in the delegation of powers, the police power of internal regulation, in respect to the rights of citizens of states, and more particularly in regard to health, has never been a power delegated under the Constitution of the United States to Congress, and is, therefore, a power clearly reserved to the individual states under the general police power vested in them.

This leads us to the discussion of our points which follows:

I. The Eighteenth Amendment to the Federal Constitution prohibited the use of intoxicating liquors for beverage purposes only.

II. The states by the Eighteenth Amendment did not delegate to Congress the power to regulate health. The complete suppression of malt liquors for medicinal purposes infringes upon such state power.

III. The prohibition of intoxicating malt liquors for medicinal purposes is neither an appropriate nor a reasonable exercise of the prohibitory power of Congress.

**POINT I.**

**The Eighteenth Amendment to the Federal Constitution prohibited the use of intoxicating liquors for beverage purposes only.**

The Eighteenth Amendment reads as follows:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction hereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

It is apparent from the language of this amendment that the limitation is to the prohibition for beverage purposes only. Moreover, in the enactment of the National Prohibition Law, commonly known as the "Volstead Act," the very heading indicates that Congress recognized the differentiation as to the use of liquors prohibited by the amendment, for that heading reads:

*"An Act to Prohibit intoxicating beverages, and to regulate the manufacture, production, use and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye and other lawful industries."*

By the Volstead Act, Congress also assumed to make regulations, not only for the prohibition of intoxicating liquors for medicinal purposes, but also to regulate the manufacture and sale for other purposes not covered by the Eighteenth Amendment, such as sacramental and industrial uses. There is not, at present, any decision of this Court which specifically sustains the right of Congress to make such regulations.

The justification for it, may be found in the theory, that Congress assumed to do it because the excessive use of intoxicating liquors for purposes, other than beverage, might lead to their abuse in that persons ostensibly manufacturing liquors for the other three purposes, would divert these liquors to beverage use.

It was in furtherance of this object, that the Department issued Regulations 60, and amended these regulations so as to include a permit system for intoxicating malt liquors in Treasury Decision 3239.

This was subsequent to the opinion of Attorney General Palmer, rendered March 3, 1921, who said :

"In answering the first three questions, it may be well to quote the language of my opinion of December 13, 1920 (32 Op. 361), where in referring to Section 1, Title II of the National Prohibition Act, I said: The word

'liquor' is expressly defined in Section I above quoted, to include whiskey and other liquors enumerated in Section I, it is provided that the term 'liquor, includes alcohol,' brandy, whiskey, rum, gin, beer, ale, porter, wine and liquors enumerated in your first three questions, come within the definition of the term 'liquor' \* \* \*

It was not the purpose of Congress to prohibit the use of liquor for non-beverage purposes, as is evidenced by the wording of the title of the National Prohibition Act.

'An act to prohibit intoxicating beverage and to regulate the manufacture, production, use and sale of high proof spirits for other than beverage purposes, and to insure an ample supply of alcohol, and promote its use in scientific research and in the development of fuel, dye and other lawful industries' (41 Stat. 305).

However, it was necessary to regulate the traffic in non-beverage liquor in order to accomplish the purpose of the Act, which was as stated, to prevent the use of liquors for beverage purposes. *The use of liquor as a medicine was recognized by Congress to be a non-beverage use.* This is shown by the provisions made for the issuance of permits to prescribe (see Section 7, Title II, 41 Stat. 311). I am, therefore, of opinion that the Commissioner may issue permits."

and further said:

"The manufacture or sale of liquor for medicinal purposes has not been prohibited. The Constitutional amendment does not expressly confer power to prohibit either. It may be assumed that Congress, for the purpose of making the prohibition law effective, could have placed some limit upon the quantity of liquor that should be either manu-

factured or sold for medicinal purposes, and that it might have indicated, in general terms, the character of such limitation, and authorized the Executive officers to carry out the purpose thus expressed by proper regulations. I can find in the Act, however, no purpose either to directly impose such a limitation, or to confer upon the executive officers any power to do so. I think, therefore, that a regulation having this in view, could be, in effect, an amendment of the Statute and not a mere regulation to carry out the expressed purpose of Congress. Section 6 of the Act contains a number of provisions relating to permits, and must be taken to describe in general, the scope of the regulations which may lawfully be promulgated. There is no reference here, however, to a purpose to limit the quantity produced or sold." (Italics ours.)

The validity of War Time Prohibition, the Eighteenth Amendment, and the Volstead Act, were passed upon in

*Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146;  
*Ruppert v. Caffey*, 251 U. S. 264;  
*Rhode Island v. Palmer*, 253 U. S. 350.

In these cases there is direct recognition that the prohibition of intoxicating liquors was for beverage purposes only. We refer to certain quotations from *Rhode Island v. Palmer*, which indicate that this Court recognized the limitation of the amendment to prohibition for beverage purposes, for Justice Van Devanter said in his conclusions known as Subdivisions 10 and 11:

"That power may be exerted against the disposal for *beverage* purposes of *liquors* manufactured before the Amendment became effective, just as it may be against subsequent manufacture for those purposes. In either case it is a constitutional mandate or prohibition that is being enforced.

While recognizing that there are *limits beyond which Congress cannot go in treating beverages as within its power of enforcement*, we think those limits are not transcended by the provision of the Volstead Act (title II, sec. 1), wherein liquors containing as much as  $\frac{1}{2}$  of 1 per cent of alcohol by volume, and fit for use for beverage purposes, are treated as within that power. *Jacob Ruppert v. Caffey*, 251 U. S. 264, *ante*, 260, 40 Sup. Ct. Rep. 141." (Italics ours.)

and Chief Justice White commenting on the limitation, likewise said in his opinion:

"In the first place, it is indisputable, as I have stated that the first section imposes a general prohibition which it was the purpose to make universally and uniformly operative and efficacious. In the second place, as the prohibition did not *define the intoxicating beverages which it prohibited*, in the absence of anything to the contrary, it clearly, from the very fact of its adoption, cast upon Congress the duty, not only of defining the *prohibited beverages*, but also of enacting such regulations and sanctions as were essential to make them operative when defined. In the third place, when the second section is considered with these truths in mind it becomes clear that it simply manifests a like purpose to adjust, as far as possible, the exercise of the new powers cast upon Congress by the Amendment to the dual system of

government existing under the Constitution. In other words, dealing with the new prohibition created by the Constitution, operating throughout the length and breadth of the United States, without reference to state lines or the distinctions between state and Federal power, and contemplating the exercise by Congress of the duty cast upon it to make the prohibition efficacious, it was sought by the second section to unite national and state administrative agencies in giving effect to the Amendment and the legislation of Congress enacted to make it completely operative."

(Italics ours.)

Fundamentally, there is presented this concrete proposition that the Eighteenth Amendment did not prohibit the use of intoxicating liquors for medicinal purposes. As Justice White lays down the rule that it is for Congress to define the character of an intoxicating beverage, does it follow that there is in Congress a declaratory power not only to define intoxicating liquor, but also to declare what is, and what is not medicinal, and thus destroy completely the use of malt intoxicating liquors previously valid for medicinal purposes?

We assert that this declaratory power has not been specifically passed on in the opinions of this Court in either *Ruppert v. Caffey*, or *Hamilton v. Kentucky Distilleries*, because the limitation to liquor containing more than  $\frac{1}{2}$  of one per cent alcohol is merely a definition by Congress of what is an intoxicating liquor. Of course, the complete prohibition of the use of malt liquors authorized by the War Time Prohibition Act of November 21, 1918, covered by the *Hamilton* case, was merely a justification of the

extraordinary powers exercised by Congress and the President during a period of national emergency. In none of these decisions by this Court, has there been any expression of opinion which authoritatively passes upon the present proposition.

Some light may possibly be derived from the opinion in *Street v. Lincoln Safe Deposit Company*, 254 U. S. 88, where the first limitation on the Enforcement of the Volstead Act was made. This Court there held that the Volstead Act did not prohibit the lawful storage of intoxicating liquors for beverage purposes, and did not prohibit the transportation from a storage warehouse company to the home of the appellant, for the Court held that so long as the liquor was not to be used for sale, barter or exchange, or disposition in violation of the provisions of the law, the Government could not prevent its removal from the storage warehouse to the home.

In the concurring opinion, Mr. Justice McReynolds said:

"The Eighteenth Amendment gave no such powers to Congress,—manufacture, sale and transportation are the things prohibited—not personal use."

While the Street case may not be directly germane, it has this important bearing on the issues of the present controversy, namely, that it indicates the tendency of this Court to limit the language of the amendment so as to provide for prohibition only within those limits directly set forth in its context namely, manufacture, sale and transportation of intoxicating liquors for beverage purposes.

**POINT II.**

**The states by the Eighteenth Amendment did not delegate to Congress the power to regulate health. The complete suppression of malt liquors for medicinal purposes infringes upon such state power.**

We approach the discussion of this point with the feeling that so often has there been placed before this Court, the question of state delegation of power, the limitation upon the police power of the states, and the denial of such power to Congress, except where necessary to carry out a constitutional function, that it would be useless to overburden this brief with citations based upon such fundamentals. We have, therefore, confined our citations to cases, which relate directly to the limitation upon Congress from enacting statutes which transgress the established rights of the States in the control of health. This is still a State function, and remains undelegated to Congress. We also cite some cases relative to the exercise of the police power in carrying out these functions which may constitutionally be exercised by Congress.

In Judge Garvin's opinion in *Piel v. Day*, which is before this Court, 278 Fed. 223, the Learned Judge conceded that:

"(1) Without the Eighteenth Amendment, the Willis-Campbell Act would have been an attempted exercise of police power. That power has never been delegated by the states to the federal government" (*Prigg v. Pennsylvania*, 41 U. S. 539, at page 625).

But, further said in his second proposition:

"(2) The authority of this decision is not questioned. If, however, Congress cannot effectively enforce the provisions of the Amendment involved, except by the exercise of police power, it is well settled that it may exert such power."

Judge Garvin in the third proposition, page 226, justifies the Willis-Campbell Act by the investigation which Congress made relative to the medicinal qualities of beer, and also refers to the fact that certain states had considered it essential, in the enforcement of their respective liquor laws, to forbid absolutely the use of certain liquors for any purposes. Here we are met at once with the situation (as the Government contended below, and will no doubt contend here) that because the States have assumed in certain cases in order to carry out their State prohibition laws, to absolutely forbid the use of intoxicating malt liquors, even for medicinal purposes; that this affords a justification for Congress to do likewise.

On this proposition there was cited below, and will no doubt be cited here, *Purity Extract v. Lynch*, 226 U. S. 192. This case was referred to in the opinion of Mr. Justice Brandeis in *Ruppert v. Caffey*, 251 U. S. 264, at page 289.

In *Purity Extract v. Lynch*, in which the prevailing opinion was written by Justice Hughes, it was decided only that the State might in the exercise of its police power prohibit the use of intoxicating malt liquors in order to effectually carry out its State Prohibition, for Justice Hughes said:

"That the state, in the exercise of its police power, may prohibit the selling of intoxicating liquors, is undoubted. *Bartemeyer v. Iowa*, 18 Wall, 129, 21 L. ed. 929; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Kidd v. Pearson*, 128 U. S. 1, L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Crowley v. Christensen*, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13. It is also well established that, when a state exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. *Booth v. Illinois*, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; *Otis v. Parker*, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; *Ah Sin v. Wittman*, 198; U. S. 500, 504, 49, L. ed. 42, 1144, 25 Supp. Ct. Rep. 756; N. Y. ex rel. *Silz v. Hesterberg*, 211 U. S. 31, 53 L. ed. 75, 29 Supp. Ct. Rep. 10; *Murphy v. California*, 225 U. S. 623, 56 L. ed. 1229, 32 Sup. Ct. Rep. 697. With the wisdom of the exercise of that judgment, the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold, otherwise, would be to substitute judicial opinion of expediency for the will of the legislature,—a notion foreign to our constitutional system."

There cannot, in the course of that opinion, be found any specific authority to hold that what was permitted to the States, was likewise delegated to Congress, for the prohibition of liquors for medicinal purposes was not included in the delegation of power covered by the Eighteenth Amendment. It is apparent that the power of the States to enforce prohibition, resting on the general rights of the State to regulate the health of its citizens, was a broader function, and not subject to the limitation which has been fastened upon Congress by the express language of the Eighteenth Amendment.

This leads us, naturally, to the first sub-division of this point, namely, in relation to the delegation of power.

This Court need hardly be reminded of the fundamental proposition frequently reiterated that the National Government is one of delegated powers, which were derived from the States by the original Constitution, and its successive amendments. It may thus be briefly summarized, that by the Constitution as first enacted, the States surrendered many functions to the National Government, and that these functions were gradually enlarged by the various amendments which followed since 1787. It is also elementary that the distinction between National and State functions still remains, and that the powers which are un-delegated still rest in the States.

Among these functions, the power to regulate health was never delegated by the States to Congress, and is, therefore, a power expressly reserved to the States. It is apparent that the right to practice medicine, the right to manufacture

drugs, and the right to manufacture liquors for medicinal purposes, still exist undisturbed, and that Congress has no express power to interfere with these rights. If, in the regulation of National Prohibition for beverage purpose, it becomes necessary to establish certain restrictions upon the manufacture of intoxicating liquors for non-prohibited purposes, these restrictions must always be taken in connection with the Constitutional right of the individual to enjoy those privileges of life, liberty and pursuit of happiness, which are guaranteed to him under the Constitutions not only of the United States, but also of the States.

In the decisions of this Court, this distinction is manifested in the cases in which acts of Congress have been held to be unconstitutional because they violate State functions, or because Congress has transcended its power.

That there is such limitation upon the power of Congress is well illustrated in *Marshall v. Gordon*, 243 U. S. 521, where Congress sought to punish a former United States Attorney for the publication of certain letters in connection with proceedings against a former member of the House of Representatives, then under investigation, because of alleged illegal conditions relative to the Sherman Anti-Trust Law. The House adjudged Mr. Marshall in contempt, and issued a Warrant of Arrest. A Habeas Corpus was sued out and this Court held that Congress was without power in this matter. Chief Justice White said in the course of the opinion, at page 536:

"No power was expressly conferred by the Constitution of the United States on the subject except that given to the House to deal

with contempt committed by its own members. Article I, Sec. 5. As the rule concerning the Constitution of the United States is that powers not delegated were reserved to the people of the states, it follows that no other express authority to deal with contempt can be conceived of. It comes, then, to this: was such an authority implied from the powers granted? As it is unthinkable that in any case from a power expressly granted there can be implied the authority to destroy the grant made, and as the possession by Congress of the commingled legislative-judicial authority as to contempts which was exerted in the House of Commons would be absolutely destructive of the distinction between legislative, executive and judicial authority which is interwoven in the very fabric of the Constitution, and would disregard express limitations therein, it must follow that there is no ground whatever for assuming that any implication as to such a power may be deduced from any grant of authority made to Congress by the Constitution. This conclusion has long since been authoritatively settled and is not open to be disputed. *Anderson v. Dunn*, 6 Wheat, 204, 5 L. ed. 242; *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377. Whether the right to deal with contempt in the limited way provided in the state Constitution may be implied in Congress as the result of the legislative power granted must depend upon how far such limited power is ancillary or incidental to the power granted to Congress,—a subject which we shall hereafter approach."

That the exercise of the regulation of health is purely a matter of State control is exemplified in two cases which may be contrasted, for they pertain to the same general subject matter. These are—

*Keller v. United States*, 213 U. S. 138;  
*Hoke v. United States*, 227 U. S. 308.

In *Keller v. U. S.*, 213 U. S. 138, 144, we have a forceful example of the limitation by our highest tribunal of an invalid Act of Congress. There Congress passed an act to prohibit the introduction into this country of alien prostitutes, but went further by making it a felony for any person to harbor a girl for such purpose within three years after she shall have entered the United States. The constitutionality of this Act was attacked, because it was held that the regulation of prostitution after the entrance of the alien into the State was a matter of State jurisdiction, and not a subject of Federal legislation. The Court reversed the conviction, and held this portion of the Act unconstitutional in the following language:

"The single question is one of constitutionality. Has Congress power to punish the offense charged, or is jurisdiction thereover solely with the State? Undoubtedly, as held, 'Congress has the power to exclude aliens from the United States; to prescribe the terms and conditions on which they may come in; to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive officers.' *United States ex rel. Turner v. Williams*, 194 U. S. 279, 289, 48 L. ed. 979, 983, 24 Sup. Ct. Rep. 719. See also *Fong Yun Ting v. United States*, 149 U. S. 98, 708, 37 L. ed. 905, 911, 13 Sup. Ct. Rep. 1016; *Head Money Cases (Edge v. Robertson)*, 112 U. S. 580, 591, 28 L. ed. 798, 801, 5 Sup. Ct. Rep. 247; *Lees v. U. S.*, 150 U. S.

476, 480, 37 L. ed. 1150, 1151, 14 Sup. Ct. Rep. 163; U. S. vs. Bitty, 206 U. S. 393, 52 L. ed. 543, 28 Sup. Ct. Rep. 396.

It is unnecessary to determine how far Congress may go in legislation with respect to the conduct of an alien while residing here, for there is no charge against one; nor to prescribe the extent of its power in punishing wrongs done to an alien; for there is neither charge nor proof of any such wrong. So far as the statute or the indictment requires, or the testimony shows, she was voluntarily living the life of a prostitute, and was only furnished a place by the defendants to follow her degraded life. While the keeping of a house of ill-fame is offensive to the moral sense, yet that fact must not close the eye to the question whether the power to punish therefor is delegated to Congress or is reserved to the State. Jurisdiction over such an offense came within the accepted definition of the police power. Speaking generally, that power is reserved to the States, for there is in the constitution no grants thereof to Congress."

In the *Hoke* case (*supra*), the Mann Act, which had for its essence, the transportation of women for immoral purposes from one State to another, was sustained, not because it bore relation to internal health or morals (although these are incidentally affected), but because it was proper legislation based upon interstate commerce, a power expressly given to Congress in Section 8, Article I of the Federal Constitution.

Practically all convictions under the Mann Act hinge upon whether the element of interstate transportation of the woman for alleged immoral purposes was present. If such element does not exist, the judgment of conviction has been usually

reversed. (*Simpson vs. United States*, 245 Fed. 278; *Bayer v. United States*, 251 Fed. 35, and *Huffman vs. United States*, 259 Fed. 235.)

More recently, in the decision of the Child Labor Law, this Court has held that the power of Congress, even though intended to be beneficial, may not be asserted in respect to a purely State function, for in *Bailey v. Drexel Furniture Company*, 259 U. S. 20, the Court held the recent Federal Child Labor Law to be invalid. Chief Justice Taft said:

"It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not intrusted to Congress, but left or committed by the supreme law of the land to the control of the states. We cannot avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards. In the maintenance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.

Out of a proper respect for the acts of a co-ordinate branch of the government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting, from the weight of the tax, it was intended to destroy its subject. But in the act before us, the presumption of validity cannot prevail, because the proof of the con-

trary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the 10th Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states."

The power of the State in respect of health has also been recognized by such cases as *Jacobson v. Mass.*, 197 U. S. 11; *Dent v. W. Va.*, 129 U. S. 114; and *Watson v. Maryland*, 218 U. S. 173, in all of which the power of the State to regulate vaccination, and the practice of medicine is distinctly asserted and established as a State, and not a National function.

In the previous case construing the former Child Labor Law, *Hammer v. Dagenhart*, 247 U. S. 251, the limitations upon the powers of Congress in respect of purely State functions, were clearly pointed out in the opinion of Mr. Justice Day, who said:

"The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.

The grant of authority over a purely Federal matter was not intended to destroy the

local power always existing and carefully reserved to the states in the 10th Amendment to the Constitution.

Police regulations relating to the internal trade and affairs of the states have been uniformly recognized as within such control. 'This,' said this Court in *United States v. Dewitt*, 9 Wall. 41, 45, 19 L. ed. 593, 594, 'has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported, on former occasions, that we think it unnecessary to enter again upon the discussion.' See *Keller v. United States*, 213 U. S. 138, 144-146, 53 L. ed. 737-740, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; Cooley, Const. Lim. 7th ed., p. 11. \* \* \*

That there should be limitations upon the right to employ children in mines and factories in the interest of their own and the public welfare, all will admit. That such employment is generally deemed to require regulation is shown by the fact that the brief of counsel states that every state in the Union has a law upon the subject, limiting the right to thus employ children.

In North Carolina, the state wherein is located the factory in which the employment was had in the present case, no child under twelve years of age is permitted to work.

It may be desirable that such laws be uniform, but our Federal Government is one of enumerated powers; 'this principle' declared Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579, 'is universally admitted.'

A statute must be judged by its natural and reasonable effect. *Collins v. New Hampshire*, 171 U. S. 30, 33, 34, 43 L. ed. 60-62, 18 Sup. Ct. Rep. 768. The control by Congress over interstate commerce cannot au-

thorize the exercise of authority not intrusted to it by the Constitution. Pipe Line Cases (*United States v. Ohio Oil Co.*, 234 U. S. 548, 560, 58 L. ed. 1459, 1470, 34 Sup. Ct. Rep. 956. The maintenance of the authority of the states over matters purely local is as essential to the preservation of the supremacy of the Federal power in all matters intrusted to the nation by the Federal Constitution."

In *United States v. Doremus*, 249 U. S. 86, the Harrison Drug Act was declared constitutional because it related to the taxing power of the United States. This decision did not directly refer to, nor did it assert the power of Congress to regulate the use of drugs in the various states, and it cannot be presumed to go further than its limits, namely, that the Act provided certain regulations for physicians and pharmacists in view of the taxing power of the Federal Government.

A striking illustration of the constitutional right of a person to be treated medicinally as he chooses, or in fact, not to be treated at all, appears in the case of *People v. Cole*, 219 N. Y. 98. There, Judge Chase of the New York Court of Appeals, held invalid the conviction of a healer of the Christian Science Church, in violation of the public health laws of the State of New York, in that he assumed to practice medicine. Judge Chase in the course of his opinion, said:

"It appears from the record that it is a tenet of the Christian Science Church that prayer to God will result in complete cure of particular diseases in a prescribed, in-

dividual case. Healing would seem to be not only the prominent work of the church and its members, but the one distinctive belief around which the church organization is founded and sustained.

It is claimed that the church extends its influence and spreads knowledge of its power by practical demonstration on the part of its sincere practitioners in securing the overthrow of moral, mental and physical disease. It disclaims any reliance upon skill, education or science. In view of the tenets of the Christian Science Church the exception to the prohibition of the statute is broader than the provision of the Constitution of this state which we have quoted and which permits the free exercise and enjoyment of religious profession and worship without discrimination or preference.

The exception in the statute is not confined to worship or belief but includes the practice of religious tenets. If it was the intention of the legislature to relieve members of the Christian Science and other churches from the provisions of sections 160 and 161 of the Public Health Law to the extent of permitting them within the rules, regulations and tenets of a church to maintain an office and there offer prayer for the healing of the diseases of those that might come to such church members for treatment, and the defendant has in good faith acted in accordance therewith, he is not guilty of the crime alleged in the indictment."

The cases above cited fundamentally indicate that in the states only does the regulation of the health of the individual lie, and this power has not been delegated to Congress by the Eighteenth Amendment.

The justification for the prohibition of malt liquors for medicinal purposes by the Willis-Campbell Act rests solely upon the implied power in Congress, which is asserted by the Government, to carry out the spirit of the Eighteenth Amendment by the enactment of appropriate legislation. We assert that the total prohibition of intoxicating malt liquors for medicinal purposes is neither necessary, reasonable, nor appropriate, as is demonstrated in our Third Point.

### **POINT III.**

**The prohibition of intoxicating malt liquors for medicinal purposes is neither an appropriate nor a reasonable exercise of the prohibitory power of Congress.**

It was asserted in the courts below, and will, no doubt, be claimed here by the Government, that Congress having been vested by the Eighteenth Amendment with the power to prohibit the use of intoxicating liquors for beverage purposes, may enact, (as did the states prior to the amendment), such laws as may be deemed necessary to effectually carry out the spirit of the amendment even, although such acts of Congress infringe upon the police powers of the state.

There is, however, the other principle, that what is called by Congress appropriate legislation, may not infringe upon the constitutional powers of Congress, for this Court from its very inception has asserted and exercised the power to

declare null and void, such legislation, however economically beneficial, as may transgress the fundamentals of the Constitution.

It is unquestioned that the Federal Courts have no concern with the motives of Congress and the wisdom of legislation as a matter of political or economic expediency. When, however, such statutes infringe upon constitutional rights, this Court has frequently set aside what might be deemed to be a wise regulation of Congress from an economic standpoint. This viewpoint was well illustrated in *McCulloch v. Maryland*, 4 Wheaton 316, where Chief Justice Marshall said at page 423:

"But, were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power."

In the discussion in Congress relative to the power to pass the Willis-Campbell Act, Senator Stanley addressing the Senate in opposition, asserted that the attempt of Congress to prohibit the medicinal use of alcohol, was in violation of the Constitution, for he said (Congressional Record, p. 9038, 67th Congress) :

"\* \* \* The Senate does not determine by this bill whether beer shall be sold or prohibited as a beverage or whether any other beverage shall be sold or prohibited.

This is not a question as to the enforcement of the eighteenth amendment; this is not a question as to the enforcement of the Volstead Act. Good or bad, the eighteenth amendment has been adopted; wise or unwise the Volstead Act is a part of the organic law of the land. No Senator who opposes this bill is opposing the eighteenth amendment. No Senator who opposes this bill is opposing the Volstead Act. No Senator who opposes this bill is advocating the sale of any kind of an alcoholic beverage. This bill has nothing to do with the sale of beverage alcohol.

This bill, in the first place, provides for prohibition of the medicinal use of alcohol in certain forms, *although the eighteenth amendment does not prohibit the medicinal use of alcohol in any form whatever.* This bill proposes that a legislative body, comprising one doctor in its membership, shall pass upon a question which no man who is not a doctor can determine. With the exception of the Senator from Delaware (Dr. Ball) I doubt if there is a Senator in this body who knows anything more about the medicinal use of alcohol than he does about repairing his watch, and yet, in answer to the demand of a propaganda laymen and lawyers have

resolved themselves into a pharmaceutical association and are passing upon a technical question about which doctors differ and in open violation of the Constitution of the United States." (Italics ours.)

We have also judicial authority for the proposition that the power to prohibit the use of liquors as a beverage, does not extend to the power to prohibit them as a medicine, for in *Sarrls v. Commonwealth*, 83 Ky. 427, at pages 331-332, the Court said:

"The social order, health and security of a local community may, in the opinion of the Legislature, require that the selling or giving of spirituous, malt or vinous liquors, to be used as a beverage, be prohibited, as to which, as well as any other subject affecting the health or morals of a community, that department of the government has the power to determine; and it is not inconsistent with that object to authorize the sale of liquors as medicines when necessary for that purpose; on the contrary, while the Legislature has the power to regulate the sale of liquors to be used as a beverage, or to prohibit its sale for that purpose altogether, *it cannot exercise that power so arbitrarily as to prohibit the use or sale of it as a medicine.*"

And again:

"If the Legislature has the power at all to prohibit the sale of intoxicating liquors by retail, it exists alone because the health, peace and order of society require it; and upon that ground alone this court, without dissent, has heretofore decided it may be exercised; but there being no reason therefor, *the power of the Legislature to prohibit the prescription*

*and sale of liquors to be used as medicine does not exist, and its exercise would be as purely arbitrary as the prohibition of its sale and use for religious purposes."* (Italics ours.)

And in commenting upon this decision, Mr. Freund in his work on police power at page 210, said:

*"All prohibitory laws make an exception in favor of sales for medical purposes. This is not a legislative indulgence but a constitutional necessity, since the state could not validly prohibit the use of valuable curative agencies on account of a remote possibility of abuse. (Italics ours.) 'The power of the legislature to prohibit the prescription and sale of liquor to be used as medicine does not exist, and its exercise would be as purely arbitrary as the prohibition of its sale for religious purposes.'"*

In his opinion in the Lambert case, which has been referred to in our Introductory Statement, Judge Knox cited the Sarrls case with approval, and referring to the medicinal use of liquor, said:

*"The Eighteenth Amendment to the Constitution was designed to bring about the prohibition of intoxicating liquor 'for beverage purposes,' and was not, I think, intended to put an end to the use of liquor for purposes regarded by those who proposed the amendment, and by many of the States that ratified it, as justifiable and proper. This view was, in part, at least, entertained by Congress in enacting the Volstead law, which permits the sale and use of sacramental wines; the use, in bona fide hospitals or sanitariums of such quantity of liquor, as may properly*

be administered under the direction of a duly qualified physician employed therein, to a person suffering from alcoholism, and the use of industrial alcohol, under certain restrictions, in arts and sciences. So far as the sacramental use of wine is concerned, there is no specified limitation of the quantity that may be purchased and consumed. Instead of manifesting the same solicitude for the physical well-being of a person suffering from a disease (other than alcoholism), the proper treatment of which demands more than a pint of liquor within ten days, that it evinced for the spiritual comfort and welfare of members of certain religious sects, Congress restricted in the manner complained of, the medicinal use of intoxicating liquor."

The judicial authority in the decisions of Judges Knox and Bourquin, holding that the Willis-Campbell Act in respect to the limitation of the right of physicians to prescribe a given quantity, applies with equal force to the restriction upon the physician to prescribe a malt, rather than a spirituous or vinous liquor, and inferentially to the pharmacist and brewery which formerly assisted in the distribution and manufacture of such malt liquor.

It appears evident that Congress has transcended the bounds of its authority under the guise of enacting appropriate legislation, when it assumed to exercise the right to declare malt liquors to be non-medicinal, for that function could only be exercised by the physicians, or at best, by the States in their regulation of health.

Approaching, also, the matter of reasonableness, some thought is evoked—namely wherein did the reasonableness of the prohibition of the medical

use of malt liquors arise, since a proper permit system, as intended by Treasury Decision 3239, had just come into force before the Willis-Campbell Act was under consideration,—a system in all essentials the same as that for the control of medicinal-purpose spirits; obviously there is greater bulk in malt liquors than in spirituous, and yet Congress did not assume to prohibit the latter for medical use; nor did it prohibit such use, notwithstanding that violations were obviously more easily effectible with spirituous than with the bulkier fermented malt liquors, beer and ale.

Congress discriminates between the higher alcoholics such as whiskey, rum, gin, and the lower alcoholics, such as beer and ale, not as may be expected in a prohibition bill intended to abolish intoxication by excluding the higher intoxicants, but destroys the medicinal use of beer and ale (by nature far more innocent), when it is without the professional capacity to appraise either their inherent medicinal values, specific or general.

The Government attempts to defend the action of Congress in the argument that a flood of beer was expected because the Treasury Department following Attorney General Palmer's opinion, granted permits to brewers to manufacture beer for medicinal purposes.

May it not be pertinently asked, why there should be any greater flood of beer and malt liquors, if the manufacture for medicinal purposes were kept under regulation by the permit system, then has been and is the case, in reference to the sale and distribution of spirituous and vinous liquors by permittee druggists under prescriptions of physicians for medicinal purposes?

Conceding that there are occasional violations of the law by physicians and druggists in respect of spirituous and vinous liquors, would there be any greater violation in respect of malt liquors which are bulkier, and whose distribution is far more difficult than that of the higher alcoholics?

There was nothing in the previous experience under the Government's medicinal permit-system controlling spirituous liquors and, by the extension of this system, by Treasury Decision 3239, to fermented malt liquors, as administered, that had indicated or warranted the assumption of an "open flood of beer or ale" or that its prescription by druggists had or would necessarily transgress the Eighteenth Amendment, by having such malt liquors, prescribed for medicinal purposes, diverted to beverage uses. The Prohibition Commissioner's public statements as to the effective control of spirituous liquor prior to the enactment of the Willis-Campbell Act,—and even more emphatically since,—undeniably indicated (and indicates) that the medicinal permit system would control the medicinal permit use of beer, even more effectively than such use of spirits, because of the greater bulk of beer. This unconstitutional transgression on the health function of the State, which the Government assumes to justify as necessary legislation to enforce the Eighteenth Amendment, cannot be defended on such grounds either within the doctrine of appropriateness or reasonable necessity. The prohibition of medicinal malt liquors by the Willis-Campbell Act stands as an unwarranted exercise of the power of Congress in prohibiting a medicinal-purpose liquor when the Eighteenth Amendment authorized prohibition only for beverage purposes.

One word may be said in conclusion of this point in reference to the declaratory power of Congress, for that must be taken with reasonable limitation also. May a legislature declare a scientific fact because it has instituted some investigation? Because of such investigation, may Congress arbitrarily assume that malt liquors have no medicinal properties. That doctrine was referred to by Judge Garvin in the opinion in the Piel case, in which he said:

"\* \* \* it would therefore appear that Congress deemed this legislation imperative to accomplish effective enforcement of the amendment, and at the same time was satisfied that there is little or no value in beer either as a therapeutic agent or as a galactogogue."

In its last analysis, the scientific or medicinal value of the product should rest with the physician. Congress has transgressed not only the constitutional right of the physician to determine what is beneficial for his patients, but also the constitutional right of the patient to receive from the physician the prescription of malt liquors, if the physician deems it best for the health of his patient. In this enactment Congress assumed a function which it did not constitutionally possess. The declaratory power to define what is intoxicating, namely, the limitation to an alcoholic content of  $\frac{1}{2}$  of one per cent, may not be extended so as to give Congress power, also, to declare non-medicinal, a form of liquor which has been recognized by leading physicians as having marked medicinal and therapeutic properties.

We have in the Record affidavits from physicians of eminence on both sides, which indicate the division of opinion in the medical profession. May it be said, therefore, that Congress can positively establish a scientific fact?

A recent exhibition of legislative folly is the attempt in Kentucky to prohibit the teaching of the Doctrine of Evolution in educational institutions. That question has never been tested constitutionally, but may we not assert that whether evolution is, or is not a correct theory, is not a matter for legislation, but a matter for scientists. So also, whether malt liquors do or do not possess medicinal properties, rests in the last analysis, with the physician, not with the Legislature or Congress.

Judge Knox, in his opinion, declared "unconstitutional" that portion of Section 2, which limited the number of prescriptions of spirituous liquors and the method of prescribing by a physician. Is it not with equal force, true that the character of the liquor which the physician may prescribe, is also one which does not lie with Congress, but rests with the physician to determine what is best for his patient, subject to reasonable Congressional regulation?

The import of this decision is that while the declaratory power of Congress is conceded by Judge Knox, even that power is subject to the limits imposed by the Constitution—in this instance the 18th Amendment. While Congress may regulate under its declaratory power within the precincts of powers delegated or necessarily implied in the delegation thereof, it may not deny or prohibit a constitutional right not so dele-

gated; its declaratory power is exercisable to regulate not to prohibit such right; and such regulations may not transcend the limitations of that portion of the Constitution, which it seeks to aid.

### **CONCLUSION.**

The attempt by Congress to destroy the use of malt liquors for medicinal purposes was an invalid assumption of congressional power, and Section 2 of the Act Supplemental to Prohibition of November 23, 1921, is in this respect unconstitutional.

We therefore respectfully ask that the Final Decree of the United States District Court be reversed, that the bill of complaint be reinstated, and that the motion for a preliminary injunction be granted.

WILLIAM M. K. OLCOTT,  
WALTER E. ERNST,  
NATHAN BALLIN,  
Of Counsel for Appellant.

**THE JOURNAL OF  
THE AMERICAN  
TELEGRAPH**

---

**The Higher Superintendent of the Illinois Central.**

December 1st, 1851.

---

JAMES EVERARD & BRADSTREET, APPELLANTS,

RALPH A. DAVIS, PROMOTION DIRECTOR OF THE  
STATE OF NEW YORK, ET AL.

---

APPEAL FROM THE DISTRICT COURT OF THE FEDERAL  
STATE FOR THE NINETEEN DISRICT OF NEW YORK.

---

JOHN C. BREWER,  
Attala, Mississippi.

# INDEX.

	Page.
Status.....	1
Statement.....	2
Constitutional amendment and statutes involved.....	3
Questions involved.....	5
Argument:	
I. Purpose and effect of eighteenth amendment.....	6
II. Scope of power of Congress.....	7
III. Power of States effectively to prohibit the sale of intoxicating liquor for beverage purposes.....	10
IV. Power of States to prohibit acts, innocent in themselves, in order to effectuate purposes of main prohibition.....	12
V. Congress has power to prohibit acts, innocent in themselves, which are necessary to be prohibited in order to carry out a constitutional mandate.....	14
VI. The Willis-Campbell Act is constitutional.....	14
(a) Purpose of the act.....	15
(b) Congress has not exceeded its powers.....	15
(c) Beer not a medicine.....	20
(d) No unreasonable interference with personal rights or with States' police powers.....	24
VII. Congress the sole judge of the methods to be employed and of the necessity for executing a constitutional power.....	26
VIII. Statutes and acts of the legislatures are presumed to be constitutional.....	27
IX. Conclusion.....	28

## AUTHORITIES CITED.

### Cases:

<i>Booth v. Illinois</i> , 184 U. S. 425.....	12
<i>Crane v. Campbell</i> , 245 U. S. 304.....	13
<i>Ex Parte Virginia</i> , 100 U. S. 339.....	7
<i>Gloucester Ferry Co. v. Pennsylvania</i> , 114 U. S. 196.....	9
<i>Hamilton v. Kentucky Distilleries Co.</i> , 251 U. S. 146.....	8
<i>Hoke v. United States</i> , 227 U. S. 308.....	8
<i>Interstate, etc., Ry. Co. v. Massachusetts</i> , 207 U. S. 79.....	27
<i>Jacobson v. Massachusetts</i> , 197 U. S. 11.....	24
<i>McCray v. United States</i> , 195 U. S. 27.....	26
<i>Martin v. Hunter</i> , 1 Wheat. 304.....	26
<i>Minnesota Rate Cases</i> , 230 U. S. 352.....	25
<i>National Prohibition Cases</i> , 253 U. S. 350.....	6, 7, 19

Cases—Continued.	Page.
<i>Otis v. Parker</i> , 187 U. S. 606-----	13
<i>Pennell v. State</i> , 141 Wis. 35-----	11, 13
<i>Purity Extract Co. v. Lynch</i> , 226 U. S. 192-----	10, 16, 18
<i>Rast v. Vandeman Co.</i> , 240 U. S. 342-----	26
<i>Ruppert v. Caffey</i> , 251 U. S. 264-----	9, 14, 16
<i>Southern Ry. Co. v. United States</i> , 222 U. S. 20-----	25
<i>State v. Jenkins</i> , 64 N. H. 375-----	11
<i>State ex rel. v. Kauffman</i> , 68 Ohio St. 635-----	11
<i>State v. O'Connell</i> , 99 Me. 61-----	11
<i>State v. York</i> , 74 N. H. 125-----	11
<i>United States v. Behrman</i> , 258 U. S. 280-----	25
<i>United States v. Des Moines Co.</i> , 142 U. S. 510-----	26
<i>United States v. Doremus</i> , 249 U. S. 86-----	25
<i>United States v. United Shoe Machinery Co.</i> , 234 Fed. 127-----	27
<i>Webb v. United States</i> , 249 U. S. 96-----	25
<i>Weber v. Freed</i> , 239 U. S. 325-----	26
<i>Wisconsin R. R. Com. v. C., B. &amp; Q. R. R. Co.</i> , 257 U. S. 563-----	25
 Constitution and statutes:	
Eighteenth Amendment, U. S. Const-----	3
Narcotic Drugs Act, c. 1, 38 Stat. 785-----	25
National Prohibition Act, c. 85, 41 Stat. 305-----	4, 15, 16
Willis-Campbell Act, c. 134, 42 Stat. 222-----	4

#### MISCELLANEOUS.

<i>Cooley's Constitutional Limitations</i> , 5th Ed., p. 724-----	9
Cong. Rec., 67th Cong., 1st Sess., Vol. 61, pp. 3094–3136, etc-----	20
House Com. on Judiciary Hearings, Prohibition Legislation, 1921, 67th Cong., 1st Sess-----	20
House Report No. 224, 67th Cong., 1st Sess-----	20
Senate Report No. 201, 67th Cong., 1st Sess-----	15

# In the Supreme Court of the United States.

OCTOBER TERM, 1923.

---

JAMES EVERARD'S BREWERIES, APPEL-  
lant,  
v.  
RALPH A. DAY, PROHIBITION DIRECTOR  
of the State of New York, et al.

---

No. 200.

*APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.*

---

## BRIEF FOR THE APPELLEES.

---

### STATUS.

This is one of several suits brought to test the constitutionality of the National Prohibition Act as supplemented by the Act of Congress approved November 23, 1921, Chap. 134, 42 Stat. 222, commonly known as the Willis-Campbell Act. The several suits are described in the appellant's brief, pp. 2-3. The instant suit was filed in the District Court for the Southern District of New York by appellant to restrain the various appellees in their respective capacities from enforcing the provisions of the Willis-Campbell Act, upon the ground that

Congress exceeded its authority so far as Section 2 of that Act is concerned. The case came before Judge Hand on appellant's motion for a preliminary injunction and appellees' motion to dismiss. The motion for a preliminary injunction was denied and the motion to dismiss granted, without opinion (R. 58). The case is here on direct appeal.

#### **STATEMENT.**

Appellant James Everard's Breweries is a New York Corporation and has its principal place of business in New York City. For a number of years prior to the adoption of the Eighteenth Amendment it was engaged in the manufacture and sale of lager beer and other malt liquors for use principally as beverages. After the adoption of the Amendment and the passage of the National Prohibition Act, the ruling of the Attorney General of March 3, 1921, and the issuance of Treasury Decision 3239, appellant and other breweries throughout the country applied to the Commissioner of Internal Revenue for permits to manufacture intoxicating malt liquors, such as beer, ale, porter, etc., for medicinal purposes. On November 15, 1921, a permit was issued to appellant, and thereafter it actively engaged in the manufacture and sale of such liquors for medicinal purposes until the passage of the Act Supplemental to the National Prohibition Act on November 23, 1921, which revoked appellant's permit, as well as those issued to physicians and pharmacists, respectively, for the prescription and sale of medicinal beer.

Alleging that the enactment of the Supplemental Act, in so far as it attempts to provide "That only spirituous and vinous liquor may be prescribed for medicinal purposes, and all permits to prescribe and prescriptions for any other liquor shall be void," is beyond the power conferred on Congress by the Eighteenth Amendment, and therefore unconstitutional and void, appellant brought this suit to restrain the appellees from enforcing the terms and provisions of the Act by declining further to approve applications of druggists and physicians, respectively, to sell and prescribe intoxicating malt liquors brewed for medicinal purposes, and from interfering with appellant's manufacture of such liquors and their sale for medicinal purposes to permittee druggists (R. 2-15). The bill was dismissed, as above stated.

**CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED.**

The Eighteenth Amendment to the Constitution provides:

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

The Act of October 28, 1919, Chap. 85, 41 Stat. 305, officially styled The National Prohibition Act, provides, Title II:

SEC. 1. When used in Title II and Title III of this Act (1) the word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes.

SEC. 3. No person shall, on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

The Act of November 23, 1921, Chap. 134, 42 Stat. 222, supplementing the National Prohibition Act, and commonly known as the Willis-Campbell Act, provides:

SEC. 2. That only spirituous and vinous liquor may be prescribed for medicinal purposes, and all permits to prescribe and prescriptions for any other liquor shall be void.

**QUESTIONS INVOLVED.**

The questions presented are:

(1) Whether in enacting Section 2 of the Willis-Campbell Act Congress exceeded its powers, in view of that portion of the Constitution which limits to Congress the express powers delegated to it, and expressly reserves to the States those powers not delegated.

(2) Whether the police power of internal regulation in respect to the rights of citizens of States, and more particularly in respect to health, have been delegated under the Eighteenth Amendment to Congress, or is a power reserved to the individual States under the general police power vested in them.

(3) Whether the Act is destructive of the personal liberty of the physician to prescribe and of the patient to be treated in such manner as the physician, from his knowledge and experience, deems best for the patient.

(4) Whether the enactment is an unwarrantable interference with and destruction of the right of breweries to cooperate with physicians, patients, and druggists in the manufacture and sale of intoxicating malt liquors for medicinal purposes, a use not prohibited by the Eighteenth Amendment.

**ARGUMENT.****I.**

In passing upon the constitutionality of the Eighteenth Amendment, this Court, in National Prohibition Cases, 253 U. S. 350, 386, said:

That Amendment, by lawful proposal and ratification, has become a part of the Constitution, and must be respected and given effect the same as other provisions of that instrument.

**Purpose and effect of Eighteenth Amendment.**

The purpose and effect of the Eighteenth Amendment are to impose a general prohibition upon the traffic in intoxicating liquors for beverage purposes throughout the territorial limits of the United States.

The Amendment prohibits the manufacture, sale, or transportation of intoxicating liquors for beverage purposes. It, however, does not define what are intoxicating liquors, but having forbidden traffic in intoxicating liquors for beverage purposes it confers upon Congress and the several States the power and authority to define what are intoxicating liquors within the Constitutional inhibition. In pursuance of such authority, Congress has defined said liquors as including any liquids, by whatever name called, containing one-half of one per centum or more of alcohol by volume which are fit for use for beverage purposes, and such definition has been sustained by this court as a proper exercise of legislative authority to effectuate the purpose of the Amendment, even though this definition might prohibit

the manufacture and sale of liquors not intoxicating in fact. *National Prohibition Cases, supra.*

Section 2 of the Amendment provides, *inter alia*, that Congress and the several States have concurrent power to enforce this article by "appropriate legislation." "Appropriate legislation," as used in this section, necessarily means such legislation as will tend to make this constitutional provision completely operative and effective; that is, legislation which will give full force and effect to the constitutional inhibition against the traffic in intoxicating liquor. The duty of enforcing this prohibition carries with it full power to do all things necessary for its accomplishment. This is the construction put upon these words as found in other parts of the Constitution. See *Ex Parte Virginia*, 100 U. S. 339.

The unquestioned purpose of the Amendment is absolutely to prohibit all traffic in and use of intoxicating liquor for beverage purposes and to protect the people against the well-known evils of such traffic; and in order completely to effectuate that purpose Congress has been clothed with full power so to legislate with respect to the subject matter as to completely and effectively accomplish that purpose.

## II.

### **Scope of power of Congress.**

The power of Congress effectively to prohibit the manufacture and sale of intoxicating liquors for beverage purposes is as full and complete as the police powers of the States effectively to enforce such

prohibition in order to promote the health, safety, and morals of the community. The Eighteenth Amendment conferred no new power or authority to make or sell intoxicating liquors for medicinal purposes. The States already had full police power over the subject.

Without the Eighteenth Amendment the Willis-Campbell Act would have been an attempted exercise of police power. It is admitted that that power has never been delegated by the States to the Federal Government. If, however, Congress can not effectively enforce the provisions of the Amendment except by the exercise of a qualified police power, it is well settled that it may exert such power. In *Hamilton v. Kentucky Distilleries Company*, 251 U. S. 146, this Court said (p. 156):

That the United States lacks the police power and that this was reserved to the States by the Tenth Amendment is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power, or that it may tend to accomplish a similar purpose.

In *Hoke v. United States*, 227 U. S. 308, where it was contended that the White Slave Act infringed the police powers of the State, this Court said (p. 323):

The principle established by the case is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation "among the several

States"; that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulation.

And in *Ruppert v. Caffey*, 251 U. S. 264, 299, this Court held that the incidents attending the exercise by Congress of its war power to prohibit the liquor traffic are the same as those that attend the States' prohibition under the police power.

See also *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 215; Cooley's Constitutional Limitations, Fifth Ed., p. 724.

There is no distinction between the power of States with respect to prescribing liquors for medicinal purposes under the so-called police power and the power of the Federal Government under the prohibition amendment to the Federal Constitution. The power of the Federal Government under the prohibition amendment is as broad and as general as is the power of the States under their police powers to deal with the subject. The Amendment to the Constitution gives Congress power to legislate to prevent the manufacture and sale of intoxicating liquors for beverage purposes. The States have power under their police powers to prohibit the sale of intoxicating liquors for beverage purposes. The powers are defined and limited in exactly the same way, and manifestly the limitations upon both must be the same. In other words, whatever a State may do under its police powers

effectively to prohibit the manufacture and sale of liquor for beverage purposes, Congress may do under the Amendment.

What, then, is the extent of the power of the States over the subject under their police powers?

### III.

#### **Power of States effectively to prohibit the sale of intoxicating liquor for beverage purposes.**

The power of the States effectively to prohibit the sale of intoxicating liquors for beverage purposes has been sustained, and it has been universally and consistently held that this power carries with it the right on the part of the legislature to prohibit those acts which in its judgment would prevent the enforcement of the law against the recognized evil.

In the case of *Purity Extract Company v. Lynch*, 226 U. S. 192, was involved a statute of Mississippi prohibiting the sale of malt liquors called "Poinsettia." It appeared that this malt liquor contained no alcohol, was nonintoxicating and could not be mistaken for beer. The manufacturer contended that the statute was unconstitutional. In upholding its constitutionality this Court, through Mr. Justice Hughes, said (p. 201):

That the State in the exercise of its police power may prohibit the selling of intoxicating liquors is undoubted. \* \* \* It is also well established that when a State exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable rela-

tion to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government.

And again (p. 204):

It was competent for the Legislature of Mississippi to recognize the difficulties besetting the administration of laws aimed at the prevention of traffic in intoxicants. It prohibited, among other things, the sale of "malt liquors." In thus dealing with a class of beverages which in general are regarded as intoxicating, it was not bound to resort to a discrimination with respect to ingredients and processes of manufacture which, in the endeavor to eliminate innocuous beverages from the condemnation, would facilitate subterfuges and frauds and fetter the enforcement of the law. A contrary conclusion logically pressed would save the nominal power while preventing its effective exercise.

The general prohibition of the sale of malt liquors, whether intoxicating or not, as a necessary means of suppressing the traffic in liquors seems to be consistently upheld by the State courts. See

*State v. O'Connell*, 99 Maine, 61.

*State v. Jenkins*, 64 N. H. 375.

*State v. York*, 74 N. H. 125.

*State ex rel. v. Kauffman*, 68 Ohio St. 635.

*Pennell v. State*, 141 Wis. 35.

In *Booth v. Illinois*, 184 U. S. 425, the question was whether the Legislature of Illinois had the power to declare illegal options to sell and buy grain, although no element of gambling was involved. This Court, in upholding the constitutionality of the statute, said (p. 429):

A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be toward that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils can not be successfully reached unless that calling be actually prohibited, the courts can not interfere unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law.

#### IV.

##### **Power of States to prohibit acts, innocent in themselves, in order to effectuate purposes of main prohibition.**

It is well settled that a State, in enacting legislation prohibiting certain acts regarded as a public evil, may include acts, innocent in themselves, but which have been shown by experience to be necessary to be included in the prohibition of the statute in order to effectuate the purpose of the main prohibition.

In *Crane v. Campbell*, 245 U. S. 304, a statute of Idaho which rendered criminal the mere possession of whisky for personal use was attacked on the ground that it conflicted with the Fourteenth Amendment. In disposing of the case this Court said (p. 307):

It must now be regarded as settled that, on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guarantees of the Fourteenth Amendment. \* \* \* As the State has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render the exercise of that power effective.

In *Pennell v. State*, 141 Wis. 35, the Court, in upholding a statute which included within its purview certain acts innocent in themselves, said (p. 40):

This principle has been applied to liquor laws quite uniformly and with reference to statutes substantially like ours which prohibit the sale not only of intoxicants but of those nonintoxicating beverages the sale of which might easily be made a cover for the sale of intoxicants.

In *Otis v. Parker*, 187 U. S. 606, this Court held (p. 609):

If the State thinks that an admitted evil can not be prevented except by prohibiting a calling or transaction not in itself necessarily

objectionable, the courts can not interfere, unless, in looking at the substance of the matter they can see that it is a clear, unmistakable infringement of rights secured by the fundamental law.

## V.

**Congress has power to prohibit acts, innocent in themselves, which are necessary to be prohibited in order to carry out a constitutional mandate.**

So, likewise, Congress in enforcing the Eighteenth Amendment has full power to prohibit certain acts, innocent in themselves, which common experience shows are necessary to be prohibited in order to regulate an abuse of, and put an end to obstructions to, the general prohibition of the use of intoxicating liquors for beverage purposes as contained in the Eighteenth Amendment and the National Prohibition Act.

In *Ruppert v. Caffey, supra*, this Court said (p. 300):

The implied war power over intoxicating liquors extends to the enactment of laws which will not merely prohibit the sale of intoxicating liquors but will *effectively prevent* their sale.

With the foregoing principles in mind, we come to consider the statute in question.

## VI.

**The Willis-Campbell Act is constitutional.**

The Act of November 23, 1921, supplementing the National Prohibition Act, is a lawful exercise by Congress of the constitutional power conferred upon

it by the Eighteenth Amendment effectually to prevent the traffic in intoxicating liquors for beverage purposes as defined by Congress, and said Act is constitutional.

(A) **Purpose of the act.**

Nothing was said in the Volstead Act about prescribing beer or wine for medicinal purposes, but the Attorney General ruled that under that Act beer or wine might be prescribed for such purposes. The limitation in the law applying only to spirituous liquors (Title II, Sec. 7), it followed that if beer and wine could be prescribed at all for medicinal purposes they could be prescribed in any quantity. Because of this situation, Congress passed the present Act providing that only spirituous and vinous liquor may be prescribed for medicinal purposes. (Senate report No. 201, 67th Cong., 1st Sess.). Congress had not intended by the Volstead Act to allow the indiscriminate prescribing of beer as a medicine and thereby to defeat the purpose of that Act and the Eighteenth Amendment, so the new Act writes nothing into the law not contemplated by the Volstead Act which has been held constitutional by this Court. It is merely an amendment to cure defects in that Act developed in the course of its enforcement.

(B) **Congress has not exceeded its powers.**

In approaching this subject it is well to bear in mind the very common and notorious difficulties always attendant upon the efforts of the States and

the Federal Government to suppress the liquor traffic. That these difficulties are recognized by this Court is shown by the following language in the *Purity Extract Company case, supra*:

It was competent for the Legislature of Mississippi to recognize the difficulties besetting the administration of laws aimed at the prevention of traffic in intoxicants—

And in *Ruppert v. Caffey, supra*:

That the Federal Government would, in attempting to enforce a prohibitory law, be confronted with difficulties similar to those encountered by the States, is obvious.

It also should be remembered that the Volstead Act, to which the present Act is an amendment, provides, Sec. 3, Title II, that all the provisions of the Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

The power conferred upon Congress by Section 2 of the Eighteenth Amendment is plain in its nature and commits to Congress the discretion to determine the legislation necessary and appropriate to enforce the provisions of Section 1 of the constitutional amendment.

Congress, having been given full authority to make complete and effective the constitutional inhibition against the traffic in and use of intoxicating liquors for beverage purposes, may very properly deem it wise to place limitations upon the use of such liquors and even prevent the use of certain specified liquors

for medicinal purposes so as to prevent the sale of such liquors for beverage purposes, for it is well known that the unrestrained traffic in liquor for medicinal purposes results in great abuses and serves as a ready means of defeating the constitutional inhibition against the use of same for beverage purposes.

As the power completely and effectively to prohibit the traffic in and use of intoxicating liquor for beverage purposes has been conferred upon Congress, to deny it the right to regulate the use of such liquor for nonbeverage purposes or even absolutely forbid the use of certain intoxicating liquor for non-beverage purposes might well destroy the power of Congress to enforce the prohibition in the Eighteenth Amendment. It is submitted that no such situation is contemplated by the Eighteenth Amendment. On the contrary, the power to make effective the constitutional inhibition against traffic in intoxicating liquors for beverage purposes very obviously includes, if that power is to exist, the power to deal with abuses of and obstructions to the constitutional inhibition, such as the procuring of intoxicating liquors ostensibly for medicinal purposes, but designed and intended for use for beverage purposes.

If an intoxicant may be used for medicinal purposes, as it may under the Constitution and the law, and its manufacture and use for such purposes are likely to lead, as undoubtedly they are, to its manufacture and sale for beverage purposes, it is unquestionably within the power of Congress to regulate

its manufacture and use for medicinal purposes, in order that it shall not be diverted from that use to a prohibited purpose.

Of course, there are limitations beyond which Congress can not go. If the enactment has no reasonable relation whatever to the prohibition of the manufacture and sale of liquor for beverage purposes, confessedly it is beyond the power of Congress. Congress could regulate or prohibit nothing that had no immediate reference to the prevention of the use of intoxicating liquors for beverage purposes. But this Court held in the *Purity Extract Company case, supra*, that the prohibition of the sale of malt liquor that was non-intoxicating, and had no alcoholic content whatever, was reasonably adapted to secure the end of the prohibition of the manufacture and sale of intoxicating liquors for beverage purposes. This Court said (p. 201):

When a State exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective.

So here, Congress may prevent the manufacture and sale of malt liquors for medicinal purposes, if, in its legislative judgment, the manufacture and sale of such liquor would make easier the avoidance of the Constitution and statute intended to prevent the use of intoxicating liquors for beverage purposes.

Furthermore, the Eighteenth Amendment prohibits the manufacture and sale merely of intoxicating liquors. This court held in effect (*National Prohibition Cases, supra*) that it was within the power of Congress to include also the manufacture and sale of liquors which are not intoxicating, if the manufacture and sale of such nonintoxicating liquors would make easier the manufacture and sale of intoxicating liquors for beverage purposes. If, therefore, Congress may extend or expand, so to speak, the constitutional amendment with reference to intoxicating liquors so as to bring in those that are not intoxicating, the manufacture and sale of which would prevent the enforcement of the statute, likewise Congress may expand the other portion of the amendment, viz., the phrase "for beverage purposes," and include purposes other than those that are beverage, if the sale for those purposes will render it impossible to carry out the purposes of the Amendment or the statute for its enforcement.

If for the purpose of effectually preventing the illegal manufacture and sale of intoxicating liquors it becomes necessary to regulate their manufacture and sale for legitimate purposes, as experience has shown it is, then Congress may exercise that power and enact such reasonable legislation as is calculated to effect that end. Accordingly Congress may regulate the manufacture and sale of liquor for medicinal purposes, and in so doing unquestionably may prohibit the prescription by a physician of such liquor as in the judgment of Congress and the medical

profession has no therapeutic value. It therefore becomes a question of fact whether there was sufficient evidence before Congress to enable it to say in this instance that beer has no therapeutic value, or that it has so little value as that to permit it to be prescribed for medicinal purposes would largely defeat the purposes of the Amendment. What was the evidence on that subject?

(C) **Beer not a medicine.**

The Judiciary Committee of the House held exhaustive hearings on the question whether beer has any therapeutic value. (House Committee on Judiciary Hearings, Prohibition Legislation, 1921, 67th Cong., 1st Sess.) All interests were permitted to present their views and the matter was fully debated by both houses. (Cong. Rec., 67th Cong., 1st Sess., Vol. 61, pp. 3094-3136; 3454-3461; 3595-3596; 4032-4039; 8748-8756.) The evidence presented to the committee that beer is not recognized as a medicine was overwhelming. (House Report No. 224, 67th Congress, 1st Sess.) The evidence showed that beer and other malt liquors serve no medical purpose which can not be satisfactorily met in other ways. If a patient needs alcohol it can be prescribed. If malt be sometimes of use it may be prescribed, or the two may be combined in a prescription so as to secure their utility.

A large majority of the reputable physicians of the country are fully convinced that alcohol has no medicinal or tonic value no matter in what form

administered. They believe that the sole use of alcohol in a medicine is as a solvent for medicinal properties which otherwise would be difficult of employment, and that beer is no remedy of any sort for any kind of disease whatever.

Seventy-eight per cent of the 152,627 physicians of the country have taken out no permits whatever, and in 24 States no physicians have permits to prescribe liquors for medicinal purposes. Only 22 per cent of the physicians of the United States prescribe liquors of any kind. Twenty-nine States of the Union have laws now in force prohibiting the prescribing of beer as a medicine.

*United States* The **National Pharmacopoeia**, which is the official and recognized list of useful medical drugs and chemicals of the United States, and is to the medical profession what the decisions of this court are to the legal profession, never included beer as a medicine. Nor is it included as such in the reputable textbooks generally used throughout the medical schools. Its use as a medicine is discountenanced by the most eminent physicians, surgeons, and scientists. It has been rejected by professors of medicine in 24 reputable medical colleges, including the special research institutions for medical advancement, such as The Rockefeller Institute, The Mayo Foundation, and other expert institutions.

In 1917 the American Medical Association, which comprises 150,000 physicians in the United States, declared that the use of alcohol as a therapeutic agent should be discouraged.

The evidence before the committee was to the effect that if beer were permitted as a medicine it would be impossible to enforce the prohibition law. It was shown that immediately after the Attorney General's ruling that beer might be prescribed as a medicine, about 100 breweries filed applications for permits to manufacture beer for medicinal purposes. In a large majority of the States beer could not be prescribed or sold as a medicine. Four or five breweries probably could supply all the beer that was needed for such purpose, so Congress might have readily concluded that to bring in 95 or 96 more would force these into illegitimate trade in order to exist. In such a situation, and especially since beer has never been recognized as a medicine by any reputable authority, it was reasonable for Congress to prohibit by law the use of beer as a medicine.

It was stated that the regulations established under the Volstead Act limiting the prescriptions of spirituous liquor worked well and that there was very little complaint by legitimate practitioners. But some, who did not have the high ethical standards of the large majority, abused the privilege, writing hundreds of prescriptions for such liquors within a few days while the total number of other prescriptions was negligible. It was not difficult, therefore, for Congress to visualize the return of breweries and saloons to fill prescriptions for alcoholic beverages which would be issued under the guise of medicinal prescriptions by the small minority of unethical physicians.

Moreover, the absolute prohibition of all alcoholic beverages for medicinal use would not deprive the medical profession of the fullest and most effective medicinal use of alcohol. An intoxicating beverage is not an indispensable medium for the medical administration of alcohol. Nothing is added to or taken from the action and effect of alcohol by mixing it with or separating it from the other ingredients of intoxicating liquor. Alcohol is used principally as a solvent, and the use of alcohol as a medical agent, separated from intoxicating beverages, is not inhibited by the Eighteenth Amendment or the enforcement law.

Most of the States have more stringent provisions than the one in question, so this legislation will work no hardship on the profession. With the small demand for even spirituous intoxicants in medical practice, when experts largely testify that it has no medical value whatever, and when the difficulties of enforcing the prohibition laws would be so greatly augmented, it is clear that Congress could reasonably say that beer should not be added to the list of medical remedies.

The prohibition of beer as a medicine has a substantial bearing on the prohibition of beer as a beverage, and it is respectfully submitted that in view of the evidence before it Congress has not transcended its power or abused its discretion in determining that beer has no therapeutic value and in forbidding its prescription as a medicine.

(D) No unreasonable interference with personal rights or with States' police powers.

Appellant earnestly contends that the enactment in question interferes with the internal regulation in respect of the rights of citizens of the States, especially as to health; is destructive of the rights and liberties of the physician and the patient; and is an attempt to regulate the practice of medicine, a power reserved to the States.

So far as such rights are based on the police powers of the States, they come within the principle announced in *Jacobson v. Massachusetts*, 197 U. S. 11, 25, that "A local enactment or regulation, even if based on the acknowledged police powers of a State, must always yield in case of conflict with the exercise by the general government of any power it possesses under the Constitution." There is nothing in the nature of an intoxicating beverage or in the act of prescribing it which gives it or the physician any immunity from the constitutional restriction, and the patient has no natural right to the administration of such beverages in contravention of the Constitution. There is here no attempt to limit or hamper a physician in the legitimate practice of his profession, or to establish health regulations in the States further than is reasonably necessary. If there be any interference as claimed by appellant, there is only such as is reasonably necessary to carry out the constitutional mandate, and power for this, to the extent necessary, has been delegated to Congress by the Eighteenth Amendment. It is conceded that Con-

gress has no power as such to regulate the practice of medicine. But it does have the power to prohibit the sale of intoxicating liquors for beverage purposes; and if, in order to accomplish that end, it is necessary to regulate or restrict the manufacture and sale of liquor for medicinal purposes it may do so, and it may regulate the medical profession to that extent, and to that extent only.

Appellant's argument might be applied to the Narcotic Drugs Act, chap. 1, 38 Stat. 785, whose purpose it was to prevent the use of narcotic drugs by addicts and for purposes that are illegitimate; but Congress found that it became necessary to restrict physicians in the way that they should prescribe narcotic drugs in order that the prohibition against the sale of them for illegitimate uses might be made effective. See *United States v. Doremus*, 249 U. S. 86; *Webb v. United States*, 249 U. S. 96; *United States v. Behrman*, 258 U. S. 280.

This principle runs all through this Court's decisions with respect to the powers of the Federal Government. For instance, the power to regulate commerce is, of course, the power to regulate interstate and foreign commerce, but this Court uniformly has held that if it is necessary to accomplish that end Congress may, as an incident, also regulate intrastate commerce. That is to say, in order to make effective legislation respecting interstate commerce Congress has power incidentally, and so far as is necessary, to regulate intrastate commerce. See *Southern Ry. Co. v. United States*, 222 U. S. 20; *Minnesota Rate Cases*, 230 U. S. 352; *Wisconsin R. R. Com. v. C. B. & Q. R. R. Co.*, 257 U. S. 563.

## VII.

**Congress the sole judge of the methods to be employed and of the necessity for executing a constitutional power.**

In the exercise of its power to make effective the prohibition of intoxicating liquors for beverage purposes Congress is the sole judge of the methods to be employed and of the necessity which occasions their employment in order to carry said power into execution.

No principle of constitutional law is more firmly established than that the court may not in passing upon the validity of a statute inquire into the motives of Congress or the wisdom of the legislation, nor will it pass upon the necessity for the exercise of a power possessed by the legislature. If evidence was required, it will be presumed that it was before the legislature when the act was passed.

*United States v. Des Moines Co.*, 142 U. S. 510.

*McCray v. United States*, 195 U. S. 27.

*Weber v. Freed*, 239 U. S. 325.

*Rast v. Van Deman Co.*, 240 U. S. 342.

The language of Mr. Justice Story in *Martin v. Hunter*, 1 Wheat. 304, is especially applicable in this instance. In speaking of the Constitution he said (p. 327):

Hence its powers are expressed in general terms, leaving to the legislature from time to time to adopt its own means to effectuate legitimate objects, and to mould and model

the exercise of its powers as its own wisdom and the public interest should require.

### VIII.

#### **Statutes and acts of the legislatures are presumed to be constitutional.**

It is well settled that statutory enactments, solemnly enacted by the legislative branch of the Government, are presumed to be constitutional and the burden of proving any particular statute to be unconstitutional is upon the party attacking such statute. Every reasonable presumption will be made in favor of the statute and the statute will be upheld by the courts unless it is clearly shown to be unconstitutional. It has even been held that a Federal statute will not be declared void by the courts unless it appears, *beyond a reasonable doubt*, that it is not within the constitutional power of Congress. In the case of *United States v. United Shoe Machinery Co.*, 234 Fed., 127, 143, the Court said:

It is a well-settled rule that the courts are slow to declare the acts of coordinate departments of the Government void, and unless it appears beyond a reasonable doubt that the act is violative of the fundamental law of the United States the courts will uphold it.

In *Interstate, etc., Railway Co. v. Mass.*, 207 U. S. 79, 88, this Court said:

It is not enough that a statute goes to the verge of constitutional power. We must be able to see clearly that it goes beyond that power. In case of real doubt a law must be sustained.

## IX.

**Conclusion.**

It is respectfully submitted that the Act entitled "An Act Supplemental to the National Prohibition Act" approved November 23, 1921, is a valid exercise of the power conferred upon Congress by the Eighteenth Amendment to pass appropriate legislation to effectuate the constitutional prohibition against intoxicating liquors for beverage purposes, and that the Act is constitutional.

JAMES M. BECK, *Solicitor General.*

MABEL WALKER WILLEBRANDT,

*Assistant Attorney General.*

MAHLON D. KIEFER, *Attorney.*

DECEMBER, 1923.



DEC 3 1922

W. J. STANSBURY  
CLERK

# SUPREME COURT OF THE UNITED STATES

Opinion Below - 1920

No. 292

## JAMES EVERARD'S BREWERIES

*Complainant-Appellant*

~~Argued~~

RALPH A. DAY, Prohibition Director of the State of New York; FRANK K. BOWERS, Collector of Internal Revenue for the Second District of New York; WILLIAM HAYWARD, United States Attorney; and DAVID H. BLAIR, as Commissioner of Internal Revenue

*Defendant-Appellees*

---

Brief on Behalf of Samuel W. Lumber  
as Amicus Curiae

---

DAVIES, AVENBAUGH & CORNELL

Solicitors for Samuel W. Lumber

Joseph S. Avenbach  
Martin A. Schindler  
Of Counsel

## INDEX.

---

### Subject Index.

	PAGE
Statement and Introduction of Brief, <i>amicus curiae</i> .....	1
Opinion of Judge Knox in <i>Lambert v. Yellowley</i> .....	6
Complaint in <i>Lambert v. Yellowley</i> .....	19
Resolution .....	27
Complainant's Main Brief in <i>Lambert v. Yellowley</i> .....	32
Complainant's Reply Brief in <i>Lambert v. Yellowley</i> .....	105

### Index to Statutes.

	PAGE
Act Supplemental to National Prohibition Act.8, 50	
Eighteenth Amendment .....	37
General Laws of Vermont, 1917, § 6452.....	67
Laws of Nevada, Nov. 5, 1919.....	15, 16
National Prohibition Act, § 7, Title 2. 8, 23, 27, 36, 83	
Public Health Law of N. Y., § 160.....	65
Regulations 60, § 71.....	28
Regulations 60, § 77, subd. (a), Article XIII.....	28
Report of Senate Judiciary Committee June 11, 1917 .....	14

**Index to Cases.**

	PAGE
<i>Adams v. Tanner</i> , 244 U. S., 590 . . . . .	61
<i>Bailey v. Drexel Furniture Co.</i> , 66 L. Ed., 522	64
<i>Barbier v. Connolly</i> , 113 U. S., 27 . . . . .	39
<i>Boldt v. Murray</i> , 2 N. Y. St. Rep., 232 . . . . .	64
<i>Bowman v. State</i> , 40 S. W., 796 . . . . .	44
<i>Busch Co. v. Webb</i> , 122 Fed., 655 . . . . .	44
<i>Carpenter v. Blake</i> , 10 Hun, N. Y., 358 . . . . .	64
<i>Carpenter v. Blake</i> , 50 N. Y., 696 . . . . .	64
<i>Children's Hospital v. Adkins</i> , 67 L. Ed., 440 . .	61
<i>Commonwealth v. Fowler</i> , 96 Ky., 166 . . . . .	71
<i>Commonwealth v. Mandeville</i> , 142 Mass., 469 . .	42
<i>Commonwealth v. Sholes</i> , 13 Allen, 554 . . . . .	56
<i>Coosaw Mining Co. v. South Carolina</i> , 144 U. S., 500 . . . . .	39
<i>Cornelli v. Moore</i> , 257 U. S., 491 . . . . .	51
<i>Dent v. West Virginia</i> , 129 U. S., 114 . . . . .	37
<i>Donnell v. State</i> , 2 Ind., 608 . . . . .	16
<i>Fabor v. Green</i> , 72 Vt., 117 . . . . .	67
<i>Falstaff Corporation v. Allen</i> , 278 Fed., 643 . .	106
<i>Freund, Police Power</i> , p. 210, § 223 . . . . .	58
<i>Gue v. City of Eugene</i> , 100 Pac. (Ore.), 254 . .	43
<i>Hamilton v. Kentucky Distilleries</i> , 251 U. S., 146 . . . . .	39
<i>Hammer v. Dagenhart</i> , 247 U. S., 251 . . . . .	63
<i>Hawker v. New York</i> , 170 U. S., 189 . . . . .	38
<i>Leecey v. United States</i> , 190 Fed., 289 . . . . .	74
<i>McLain v. State of Texas</i> , 43 Tex. Cr. Rep., 213	69
<i>Meffert v. Packer, et al.</i> , 195 U. S., 625 . . . . .	38
<i>Morrill v. Jones</i> , 106 U. S., 460 . . . . .	74
<i>Nixon v. State</i> , 76 Fed., 524 . . . . .	16
<i>People v. Ureavitch</i> , 210 Mich., 431 . . . . .	16
<i>Purity Extract Co. v. Lynch</i> , 226 U. S., 192 . .	11, 17, 52, 65
<i>Ruppert v. Caffey</i> , 251 U. S., 264 . . . . .	11, 52, 65

	PAGE
Sarrls <i>v.</i> Commonwealth, 83 Ky., 427 . . . . .	15, 59
State <i>v.</i> Aulman, 76 Iowa, 624 . . . . .	68
State <i>v.</i> Costa, 62 Atl. (Vt.), 38 . . . . .	44, 67
State <i>v.</i> Dugan, 16 R. I., 407 . . . . .	70
State <i>v.</i> Durien, 70 Kans., 1, affd. 208 U. S., 613	113
State <i>v.</i> Gravelin, 15 R. I., 403 . . . . .	70
State <i>v.</i> Intoxicating Liquors, 76 Iowa, 243 . . . . .	68
State <i>v.</i> Larrimore, 19 Mo., 391 . . . . .	58
State <i>v.</i> Roach, 75 Me., 423 . . . . .	44
State <i>v.</i> Sholts, 15 Ind., 449 . . . . .	16
St. Louis Independent Packers <i>v.</i> Houston, 215 Fed., 553 . . . . .	74
Street <i>v.</i> Lincoln Safe Deposit Co., 254 U. S., 88	32
 Tiedeman, Control of Persons and Property, § 85, p. 239 . . . . .	
Thomasson <i>v.</i> The State, 15 Ind., 449 . . . . .	45
Town of Selma <i>v.</i> Brewer, 9 Cal. App., 70 . . . . .	70
Union <i>v.</i> States, 76 Ind., 524 . . . . .	60
United States <i>v.</i> Doremus, 249 U. S., 86 . . . . .	56
United States <i>v.</i> Harris, 177 U. S., 305 . . . . .	41
United States <i>v.</i> Herron, 20 Wall., 251 . . . . .	39
United States <i>v.</i> 11,150 Pounds of Butter, 195 Fed., 657 . . . . .	74
Wait <i>v.</i> Macy, 246 U. S., 606 . . . . .	74
Watson <i>v.</i> State of Maryland, 218 U. S., 173 . . . . .	38
Whipple <i>v.</i> Martinson, 256 U. S., 41 . . . . .	56
Williamson <i>v.</i> United States, 207 U. S., 425 . . . . .	73

### Index to Medical Texts.

	PAGE
Allen, Eutis C., B. S., M. D., New Orleans Med. Jrl., 1904-5, Vol. LVII . . . . .	102
Anders, James M., Text Book of the Practice of Medicine . . . . .	88
Barker, Lewellyn F., Endocrinology and Metabolism . . . . .	104
Curschmann, Der Unterleibs—Typhus, Vienna, 1898 . . . . .	98
Ewald, C. A., Der Alkohol bei Infektions-Krankheiten . . . . .	99

	PAGE
Flint, Austin, M. D., LL. D., Treatise on Principles and Practice of Medicine .....	88
Forchheimer, F., The Prophylaxis and Treatment of Internal Diseases .....	100
Gruber, M., Der Einfluss des Alkohols auf den Verlauf des Infektionskrankheiten, Wiener Klinico Weekschrift, 1901, XIV .....	100
Hare, Hobart Amory, Text Book of Practical Therapeutics .....	90
Hutchison, Robert, M. D., F. R. C. P., Index of Treatment by various writers .....	91
Jacobi, Abraham, Dr., Am. Medicine, new series, Vol. VIII, No. 9, pp. 575-7 .....	84
Journal of American Med. Ass., The Referendum on Alcohol .....	82
Lyon, G., Traite Elementaire de Clinique Therapeutique .....	96
Martinet, A., Therapeutique Clinique .....	97
Matas, R., Surgery of the Vascular System ...	101
Minelle, M., L'Alcohol en Therapeutique, Infantile Maladies, Aigue Febriles .....	98
Osborne, Oliver T., The Principles of Therapeutics, p. 242 .....	90
Penzoldt, Lehrbuch der Klinischen Arzneibehandlung, 1921 .....	99
Richard, A., Précis de Therapeutique et de Pharmacologie .....	97
Stevens, A. A., M. A., M. D., The Practice of Medicine .....	89
Tyson, James, The Practice of Medicine .....	89
Wilcox, Reynold Webb, Materia Medica and Therapeutics .....	91
Wood, Horatio C., Therapeutics, The Principle and Practice, Tenth Edition .....	103

# Supreme Court of the United States

JAMES EVERARD'S BREWERIES,  
Complainant-Appellant,

*against*

RALPH A. DAY, Prohibition Di-  
rector of the State of New  
York; FRANK K. BOWERS, Col-  
lector of Internal Revenue for  
the Second District of New  
York; WILLIAM HAYWARD,  
United States Attorney, and  
DAVID H. BLAIR, as Commis-  
sioner of Internal Revenue,  
Defendants-Appellees.

OCTOBER  
TERM, 1923.  
No. 200.

## BRIEF ON BEHALF OF SAMUEL W. LAM- BERT, AS AMICUS CURIAE.

With the consent of counsel for the Department of Justice of the United States and for the plaintiff, counsel for Dr. Samuel W. Lambert, in *Lambert v. Yellowley*, 291 Fed., 640, beg leave of this Court to file the accompanying pleadings and briefs submitted to Judge Knox, in the United States District Court for the Southern District of New York, and also for convenient reference, the opinion in that case, wherein he has held that the clause of

the Volstead Act prohibiting physicians from prescribing to any patient more than one pint of liquor in any ten days is unconstitutional.

The opinion is referred to a number of times in appellant's brief in the case at bar, and the argument is made that the authority of such decision, inferentially, at any rate, is applicable to pharmacist and brewer in the distribution and manufacture of malt liquor for medicinal purposes (Appellant's Brief, p. 35).

The *Lambert case* is on appeal by the Government. Effort has been made to facilitate an early review by this Court, so that the law may be definitely settled. Matters of procedure have thus far made such review impracticable. The interlocutory decree overruling the Government's motion to dismiss is now before the Circuit Court of Appeals for the Second Circuit.

Our suggestion that the order of Judge Knox be made final, or that the Government join with us in requesting the Circuit Court of Appeals to certify to this Court the question as to the unconstitutionality of that part of the Volstead Act involved in the *Lambert Case*, has not met with acceptance on the part of the Government.

We respectfully suggest that such order should have been made final, notwithstanding the expression of opinion by Judge KNOX that:

"So far as I am informed, the legislation complained of does not purport to be based upon any finding as to the quantity of liquor that reasonably and properly may be required within a specified period for the treatment of disease. If otherwise, I should be inclined to dismiss the bill, it being my impression that within reasonable limits the quantity to be

prescribed may be regulated by Congress. But, accepting the complaint as made, the limitation now imposed seems to be arbitrary and without justification. Should the proof show the contrary to be the fact, the complainant, of course, cannot prevail."

For no finding by Congress could confer upon it the right to limit the amount of intoxicating alcoholic liquor requisite, in the opinion of the trained physician, for the medicinal needs of the patient. For the Eighteenth Amendment confers upon Congress only the right to forbid by appropriate legislation the manufacture of and traffic in intoxicating liquors for beverage purposes.

Moreover, it appears by the convincing and unchallenged medical authority cited in the Appendix to the Brief for Dr. Lambert (p. 81), that not infrequently it is essential for curative purposes to administer intoxicating liquor through the rectum.

In order, therefore, to have the inhibition of the Volstead Act concerning medical prescriptions upheld, the words "appropriate legislation" in the 18th Amendment, must be construed as entitling Congress, under its commission to prevent the use of *intoxicating liquors for beverage purposes*, to forbid the administration of a necessary amount of alcohol *for the prolongation or even the saving of life by means of the nutritive or stimulating enema*.

Perhaps unreason may attain to a more superlative degree in asserting that the legislation complained of is "appropriate"; but we submit that unique intellectual resourcefulness would be required to conceive of it.

On the other hand, the right to regulate strictly the giving of prescriptions so that intoxicating

liquors purporting to be for medicinal purposes may not be diverted to beverage purposes, is within the power of Congress and of the Executive Department of the Government. In the Harrison Drug Act, which forbids the giving of narcotic drugs to addicts, it is provided—in order to make impracticable the giving of narcotic drugs by unworthy physicians to the addict under the guise of medicine to those entitled to it—that all prescriptions be kept for two years, subject to visitation by the Government.

Dr. Lambert in this case is in favor not only of like regulations but of much more drastic ones. For as will be seen by its Resolution at page 30, The Association for the Protection of Constitutional Rights, of which he is the President, recommends, among other things, that all prescriptions given by physicians be impounded by the Government, so that the unworthy physician may write a count in his own indictment.

Action by Congress, however, must take the form of kindred regulations and not the form of prohibition; and therefore the decision of Judge Knox should be regarded in law as a final adjudication upon the subject.

The *Lambert case* presents the question of the constitutional right of a physician to practise medicine and to prescribe in the cure of his patients according to his best and, therefore, untrammeled scientific judgment. The action has been brought by a physician of admitted standing and repute in defense of the essential right and duty of his profession. It is in the nature of a class suit, for an association of distinguished physicians and surgeons sponsors it.

It is a matter of grave concern to the people of this country, as well as to him, that this decision remain the law. He, therefore, asks leave to submit this brief in support of such decision, in so far as its principles may, on the present appeal, be drawn into controversy.

**Relation of Case at Bar to Physician's Right to Prescribe.**

In the case at bar it is contended that the Willis-Campbell Act is unconstitutional in its denial of the right to manufacture malt liquor for medicinal purposes (Appellant's Brief, p. 2).

In the *Lambert case*, malt liquor was not especially involved. No right of manufacture was involved. The right only to prescribe liquor as a medicine was presented. The constitutional question was approached from the standpoint of the rights and duties of the medical profession. Through this profession the privilege of the sick to be cured and protected by the best available means was urged. It is not over-emphasis to say that the issues of life and death were definitely presented.

The particular statute claimed and held unconstitutional was the latter part of Section 7 of Title II of the Volstead Act, reading as follows:

"Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days."

Respectfully submitted,

DAVIES, AUERBACH & CORNELL,  
Attorneys for Complainant.

JOSEPH S. AUERBACH,  
MARTIN A. SCHENCK,  
Of Counsel.

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

SAMUEL W. LAMBERT,  
Complainant,

*against*

EDWARD C. YELLOWLEY, as Acting  
Federal Prohibition Director;  
DAVID H. BLAIR, as Commis-  
sioner of Internal Revenue,  
and WILLIAM HAYWARD, as  
United States Attorney,

Defendants.

Upon Motion of  
Defendants  
After Answer  
to Dismiss  
Complaint.

DAVIES, AUERBACH & CORNELL, Attorneys  
for Complainant (JOSEPH S. AUERBACH  
and MARTIN A. SCHENCK, of Counsel);

WILLIAM HAYWARD, United States At-  
torney, for Defendants (JOHN HOLLEY  
CLARK, Assistant United States At-  
torney, of Counsel).

KNOX, D. J.:

Complainant, a duly licensed physician under the laws of this State, is here engaged in active practise. He alleges it to be an essential part of his professional right and duty towards his patients to treat their diseases and promote their physical well-being according to his best skill and

judgment, and, to that end, to advise the use of such medicine and medical treatment as in his opinion are best calculated to effect their cure and establish their health.

Based upon his experience, observation and study of medical science, complainant believes that the use as medicine of spirituous liquors, to be taken internally, is, in certain cases, necessary for the proper treatment of patients in order to afford relief from known ailments. Such spirituous liquors contain more than one-half of one per cent. of alcohol by volume and include brandy, whiskey and wine.

Plaintiff now has under observation and subject to his professional advice certain patients whose ailments require that they should, for proper relief, use internally more than one pint of spirituous liquor in ten days, and that in certain cases it is necessary for proper medical treatment that the patient should use internally some spirituous liquor without delay, notwithstanding that within a preceding period of less than ten days the patient may have received and used more than one pint of such liquor. Complainant, conceiving it to be his duty so to do, intends, unless restrained by lawful authority, to issue prescriptions in such cases according to his best skill and judgment.

Complainant has not prescribed, and does not intend to prescribe, the use of liquor for beverage purposes, nor does he intend to prescribe the use of liquor as medicine unless, after careful physical examination, he in good faith believes that the use of liquor as medicine is necessary for the patient and will afford him relief from some known ailment.

In practising his profession, as above outlined, Dr. Lambert finds himself confronted with certain provisions of the National Prohibition Act and its amendment, as follows:

Section 7 of Title II of the Act of which reads:

"No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford him relief from some known ailment. Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days."

Similar provision relating to vinous and spirituous liquor is contained in the Act of November 23, 1921, entitled, "An Act Supplemental to the National Prohibition Act."

Both the original Act and its supplement make a violation of any of their provisions a crime, subjecting the offender to fine or imprisonment or both.

The bill goes on to allege that neither of the enactments purports to regulate the use for beverage purposes of spirituous liquors lawfully possessed, nor do they prohibit the giving of advice by any person in respect to such use or the quantities to be used. Neither do they purport to regulate the use of lawfully possessed spirituous liquors for medicinal purposes otherwise than under physicians' prescriptions, nor to regulate the giving of

advice in regard to such use, except in the case of physicians' prescriptions.

It is claimed that the limitations thus attempted to be imposed upon physicians are beyond the authority conferred upon Congress by the Eighteenth Amendment to the Constitution, and are void and of no effect.

All this is followed by an allegation that defendants have claimed and publicly stated that they will prevent, and have threatened by legal proceedings charging complainant with crime and attempting to subject him to fine and imprisonment, to prevent him from prescribing for use as medicine to be taken internally by any patient within any period of ten days, more than one pint of spirituous liquor, even though in his best judgment and after careful physical examination of the patient, such use is necessary to afford relief from some known ailment. Such proceedings, it is said, would seriously interfere with complainant's ability to practise his profession, and would subject him to irreparable damage, for which there is no adequate legal remedy. The matters complained of are asserted to be of common concern to many patients and many physicians, a number of whom have formed an organization called The Association for the Protection of Constitutional Rights, and by resolution have declared in favor of this suit.

In consideration of the foregoing, the Court is asked to declare unconstitutional so much of the aforementioned Acts of Congress as to which complaint is made.

The answer sets up that the matter here in controversy does not exceed in value the sum of \$3,000, exclusive of interest and costs, and denies

that there is any duty upon a physician to prescribe medicine contrary to law; alleges that a large number of physicians deny the therapeutic value of spirituous liquors, and that prescriptions of more than one pint of such liquors within ten days in any case is not considered necessary by a large number of reputable physicians.

In view of the motion to dismiss, which admits the well-pleaded allegations of the complaint, the answer upon the issuable facts need not be considered.

Whether or not the use of liquor in the treatment of certain known ailments is a valuable therapeutic agent is a controversial subject with which the Court is not, at present, particularly concerned. That the subject is highly controversial, is indicated by the results of a questionnaire directed to upwards of 30,000 physicians. Of this number, 51 per cent. declare whiskey to be necessary in the treatment of certain diseases, and 49 per cent. take a contrary view.

For the purposes of this motion, it is sufficient to accept the allegations of the complaint, and to consider that Congress itself, in the very legislation under attack, has recognized that in certain cases liquor has a legitimate medicinal use, and has specified the circumstances under which it may be prescribed in given instances. The difficulty is that, having done so, Congress, without reference to the quantity of liquor actually required for the proper treatment of a particular ailment from which a patient may be suffering, and irrespective of the good faith, judgment and skill of the physician in attendance, proceeds to limit the amount to be prescribed to not more than a pint within a period of ten days.

In passing upon the propriety of such limitation, it is necessary to bear in mind the grant of power under which the National Prohibition Law and its amendments were enacted, and also to inquire "whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat." *Purity Extract Co. v. Lynch*, 226 U. S., 192; *Ruppert v. Caffey*, 251 U. S., 264.

The Eighteenth Amendment to the Constitution was designed to bring about the prohibition of intoxicating liquor "for beverage purposes," and was not, I think, intended to put an end to the use of liquor for purposes regarded by those who proposed the amendment, and by many of the States that ratified it, as justifiable and proper. This view was, in part, at least, entertained by Congress in enacting the Volstead law, which permits the sale and use of sacramental wines; the use, in *bona fide* hospitals or sanatariums of such quantity of liquor, as may properly be administered under the direction of a duly qualified physician employed therein, to a person suffering from alcoholism, and the use of industrial alcohol, under certain restrictions, in arts and sciences. So far as the sacramental use of wine is concerned, there is no specified limitation of the quantity that may be purchased and consumed. Instead of manifesting the same solicitude for the physical well-being of a person suffering from a disease (other than alcoholism), the proper treatment of which demands more than a pint of liquor within ten days, that it evinced for the spiritual comfort and welfare of members of certain religious sects, Congress

restricted in the manner complained of, the medicinal use of intoxicating liquor.

If, as the complaint alleges, the administration to a patient of more than the statutory quantity of liquor is *necessary* for his relief from a certain known ailment, the inability of such patient to have his legitimate needs supplied, means that he is subjected to a prohibition that certainly is not within the terms of the Eighteenth Amendment, and which easily may be imagined, might subject him to serious consequences, if not death itself. While the exercise of regulatory power in the interest of the public at large frequently brings about individual hardship, it is to be recalled that one of its chief objects is to preserve—and is not to jeopardize and destroy—the health of its citizens. For this reason, I feel that persons are not to be deprived of the use, when required, of such medicines as are proper and necessary for their relief, unless authority for such deprivation has expressly been conferred.

All of us recognize that the unregulated use of morphine, cocaine and other habit-forming drugs may have most baneful effects; but who would say they should not, in a proper case, be prescribed by a competent physician?

Of course, the assertion can and probably will be made that the possibilities to which I have referred are a far call from the probability that any such result would be brought about through the absence of liquor from the treatment of any known ailment. It is, however, to be remembered that the admitted allegations of the complaint are that the use of more than a pint of liquor within ten days is necessary for the treatment of certain known ailments—the statute admits that the use

of liquor may sometimes be necessary—and “necessary,” while it may mean something less than indispensable, at least, includes that which is desirable, advisable and needful.

If this be true, it would seem not to be a function of the Congress—particularly under the amendment—to invade, as it were, the domain of medical authority, and to deprive patients of that which they need, and, by every principle of right and justice, are entitled to have. Having assumed so to do, it would appear that the action does not constitute legislation appropriate to the object sought to be attained through the adoption of the amendment. To me it seems reasonably clear that the right of the public to have available for its use, when required in the proper treatment of disease, an adequate supply of a valuable therapeutic agent, transcends the present power of Congress to decree otherwise upon the basis of expediency or policy. Under the facts presented by the complaint, the danger that persons bent upon a violation of the Volstead law may, through the medicinal use of liquor, be furnished with a means of procuring intoxicants for beverage purposes, is to be overcome through regulations. These may be of the most stringent character, but they must in my opinion, fall short of an actual prohibition against the use of liquor to the extent demanded by the reasonable necessities of the proper treatment of known ailments.

So far as I am informed, the legislation complained of does not purport to be based upon any finding as to the quantity of liquor that reasonably and properly may be required within a specified period for the treatment of disease. If otherwise, I should be inclined to dismiss the bill, it being

my impression that within reasonable limits the quantity to be prescribed may be regulated by Congress. But, accepting the complaint as made, the limitation now imposed seems to be arbitrary and without justification. Should the proof show the contrary to be the fact, the complainant, of course, cannot prevail.

As bearing upon what was sought to be accomplished through the instrumentality of the Eighteenth Amendment, I quote from the Report of the Senate Judiciary Committee, dated June 11, 1917, in which the adoption of a concurrent resolution submitting the amendment to the States was recommended. The Committee in setting forth some of the arguments advanced by proponents of the measure reported the following:

"National law, enacted under an amended Constitution, could prohibit transportation and sale, and in concurrence with like legislation by the states (the union of the power of the nation and the power of the states), thus securing the entire strength of the whole community, could soon put an end to the traffic. Under such restriction in a generation or two the consumption of alcohol as a beverage would practically disappear. Alcohol would still be manufactured, distributed and sold under the restrictions appertaining to other poisons; and its *use as a medicine* (italics mine) and in the arts would not be interfered with. Its manufacture and distribution would be controlled by like regulations as those made with reference to dynamite, nitro-glycerine, and gunpowder, and the whole family of poisons, and in fact, all articles of great and dangerous potency which, nevertheless, have *their legitimate uses for the benefit of mankind.*"

I have little or no doubt that it was the impelling force and reasonableness of the thought ex-

pressed by the foregoing quotation that brought about the submission of the amendment to the several States, and was responsible for its ratification by forty-five of them.

Again, it is interesting in this connection to glance at the prohibition laws of some of the States and to see how they regard the medicinal use of liquor or of alcohol.

In Kentucky, the Supreme Court, speaking in the case of *Sarrls v. Commonwealth*, 83 Ky., 427, said:

"\* \* \* while the Legislature has the power to regulate the sale of liquor to be used as a beverage, or to prohibit its sale for that purpose altogether, it cannot exercise that power so arbitrarily as to prohibit the use or sale of it as a medicine."

and again:

"\* \* \* the power of the legislature to prohibit the prescription and sale of liquors to be used as medicines does not exist, and its exercise would be as purely arbitrary as the prohibition of its use and sale for religious purposes."

Missouri ratified the amendment upon January 16, 1919, and in the enforcement of the law, which took effect upon the date that the amendment became operative, permitted the prescriptions by physicians of either alcohol or wine for medicinal purposes. The amount to be thus prescribed was not arbitrarily fixed. As late as March 28, 1921, the Legislature of that State amended the law so as to permit the prescription of intoxicating liquor other than that specified in the Act of January 16, 1919.

The State of Nevada, in a prohibition statute, enacted pursuant to a vote of her people, upon

November 5, 1919, gave permission to physicians to prescribe pure grain alcohol for medicinal purposes, and imposed no arbitrary limitation upon the quantity that might be used.

A somewhat similar statute is in force in New Mexico.

The Constitution of Michigan, Section 11, Article 16, makes provision for the prohibition of the liquor traffic, except for medicinal, mechanical, chemical, scientific or sacramental purposes, and directs that legislation provide for regulations upon the sale of intoxicants. I find no artificial limitation upon the quantity that physicians may prescribe for medicinal use. For a construction of the State statute, see *People v. Ureavitch*, 210 Mich., 431.

For years a law of Indiana made unlawful the retailing of spirituous liquor without license, and contained no exception in favor of a sale for medicinal purposes. By a long line of decisions, it has been held that a *bona fide* sale for such purposes was not within the statute. See *Donnell v. State*, 2 Ind., 608; *State v. Sholts*, 15 Id., 449; *Nixon v. State*, 76 Fed., 524. The present law, I am informed, provides only that it shall be unlawful for any licensed physician to issue a prescription for intoxicating liquor except in writing, or in any case, unless he has good reason to believe that the person for whom it is issued will use the same for medicinal or surgical purposes or as an antiseptic.

Alabama prohibits the sale of intoxicants for medical purposes save upon prescription of a regularly authorized physician.

In Florida, alcohol may be prescribed and used for medicinal purposes, and so in Mississippi, South Carolina, Georgia, Arkansas, Delaware,

Oklahoma, Oregon, Tennessee and Texas. In North Carolina, grain alcohol may be sold for medicinal purposes, and it may be prescribed under certain conditions in Washington. In South Dakota, spirituous and vinous liquors may be prescribed. The statute of Kansas excepts from its operations the medicinal use of intoxicating liquors. Colorado and Minnesota regulate the quantity of liquor that may be prescribed upon one prescription, but they do not declare the amount that a patient shall use within a specified time.

Utah prohibits the prescription of any compound containing more than one-half of one per cent. of alcohol by volume, and which is capable of being used as a beverage, and it is possible that a few other States have laws as drastic. I think, however, that it is fair to say that as a whole the ratifying States did not mean to dispense with the adequate use in a given case of such amount of specified intoxicants as were believed to possess therapeutic value.

It is, however, argued that, irrespective of all that has been said, the cases of *Purity Extract Co. v. Lynch* and *Ruppert v. Caffey, supra*, make it necessary to dismiss the complaint. I freely admit those decisions give me pause. Nevertheless, it is to be remembered that the results in those cases were in no small measure based upon the legislative and judicial history of many of the States in dealing with local prohibition statutes. Under such a course of reasoning, I feel that much support is to be found for complainant's contention in the preceding summary of legislation within the States where prohibition has been recognized for many years to be a proper and desir-

able policy. The regard which they manifested for the preservation of the right of the public to resort to the medicinal use of intoxicating liquors in the treatment of known ailments is not without influence in placing a construction upon legislation enacted pursuant to the limited authority of the Eighteenth Amendment.

From the foregoing, I have reached the conclusion that the limitations of the Volstead Act, and its amendments, which make it lawful to prescribe but one pint of intoxicating liquor for the internal and medicinal use of a person whose known ailment, if it is properly to be treated, requires the administration of a greater quantity, are void. An injunction *pendente lite* may issue against the defendant.

May 8, 1923.

U. S. D. J.

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

SAMUEL W. LAMBERT,  
*Complainant,*

*against*

EDWARD C. YELLOWLEY, as Acting  
Federal Prohibition Director,  
DAVID H. BLAIR, as Commis-  
sioner of Internal Revenue,  
and WILLIAM HAYWARD, as  
United States Attorney,  
*Defendants.*

*To the Honorable Judges of the District Court of  
the United States, Southern District of New  
York, Sitting in Equity:*

The complainant, by Davies, Auerbach & Cor-  
nell, his attorneys, for his bill of complaint against  
the defendants, respectfully shows:

FIRST: The complainant is a citizen and resi-  
dent of the State of New York, residing in the  
County of New York.

SECOND: The defendant, Edward C. Yellowley,  
is an agent of the Commissioner of Internal Rev-  
enue, duly appointed under the provisions of the  
National Prohibition Act; the defendant, David  
H. Blair, is the Commissioner of Internal Rev-  
enue, and the defendant William Hayward is the

United States Attorney for the Southern District of New York. All said defendants are charged with the duty of enforcing the National Prohibition Act in the County of New York and elsewhere in the Second Collection District of New York.

THIRD: This is a suit of a civil nature arising under the Constitution and laws of the United States. The matter in controversy exceeds the sum or value of Three thousand Dollars (\$3,000), exclusive of interest and costs.

FOURTH: For the purpose of protecting the health and lives of its citizens against disease, the State of New York has from time to time enacted laws requiring that the persons practicing medicine must be specially educated and trained as physicians, and that advice in regard to the use of medicines and drugs as an incident of medical treatment should be given only by persons educated and trained for the medical profession. The said State has also provided by law that when so educated and trained and authorized to practice in accordance with the said laws, and not otherwise, physicians may give advice in regard to the use of medicines and drugs as an incident of medical treatment.

FIFTH: Heretofore and in the year 1885, complainant, after having expended time and money in regularly prescribed training and studies to that end, was duly authorized by the State of New York to practice, and acquired the right to practice, medicine in the healing and curing of the sick and in the protection of human beings against attacks of disease, and ever since complainant has been continuously in the practice of such pro-

fession and is now practicing the same and enjoys a good reputation and standing as a physician.

SIXTH: It is an essential part of complainant's right as a physician and of his duty toward his patients to treat their diseases and promote their physical well-being according to the untrammeled exercise of his best skill and scientifically trained judgment, and, to that end, to advise the use of such medicines and medical treatment as in his opinion are best calculated to effect their cure and establish their health. By practicing medicine the complainant is authorized to and does hold himself out to the world as willing to place at the service of patients such skill and judgment as are above described, to the full extent of his ability.

SEVENTH: According to the usage and practice of the medical profession, long established and generally accepted, physicians, in advising the use of drugs and medicines, do so by written statements containing explicit directions as to the time and manner of administration and as to the quantities to be used. Such written statements and directions are called prescriptions. In issuing a prescription the physician assumes no responsibility and exercises no control in respect to procuring the drugs or medicines prescribed, but merely expresses his judgment as to what the needs of the patient require for the restoration of health.

EIGHTH: It is the belief and judgment of the complainant based upon his experience and observation and the study of medical science, that, the use as medicine of spirituous liquors to be taken internally is, in certain cases, necessary for the proper treatment of patients in order to afford re-

lief from known ailments. By spirituous liquors, complainant means liquors containing more than one-half of one per cent. of alcohol by volume, including brandy, whiskey and wine.

NINTH: In prescribing drugs and medicines, the determination of the quantity to be used involves a consideration of the physical condition of the patient, and of the probable effect thereon of such drugs and medicines, in each specific case. It is the belief of complainant, based upon his experience and observation and the study of medical science, that in the use of spirituous liquors as medicine it is in certain cases, including cases now under complainant's observation and subject to his professional advice, necessary, in order to afford relief from some known ailment, that the patient should use internally more than one pint of such liquor in ten days and that it is in certain cases necessary for proper medical treatment that the patient should use internally some spirituous liquor without delay, notwithstanding that within a preceding period of less than ten days the patient may have received and used more than one pint of such liquor. Complainant conceives it to be his duty and intends, unless restrained by lawful authority, to issue prescriptions in such cases according to his best skill and judgment.

TENTH: Complainant has never prescribed and does not intend to prescribe the use of liquor for beverage purposes. Complainant does not intend to advise or prescribe the use of liquor as medicine unless, after careful physical examination of the patient, he in good faith believes that the use of such liquor as medicine by the patient is neces-

sary and will afford relief to him from some known ailment.

ELEVENTH: By Section 7 of Title II of the National Prohibition Act it is provided in respect to physicians:

"No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford relief to him from some known ailment. Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days."

Similar provisions limiting the amount of vinous or spirituous liquor that may be prescribed for the use of any one person during any period of ten days are contained in the Act signed by the President on the 23d day of November, 1921, entitled "An Act supplemental to the National Prohibition Act."

Section 29 of the National Prohibition Act purports to make a violation of any of its provisions a crime and purports to subject the offender to fine or imprisonment or both. Like penalties are provided for a violation of the above mentioned supplement to said Act.

TWELFTH: Neither the National Prohibition Act nor the above mentioned supplement purports to regulate the use for beverage purposes of spir-

ituous liquors lawfully possessed, nor does either of said Acts prohibit the giving by any person of advice in respect to such use or the quantities to be used. Neither of said Acts purports to regulate the use for medicinal purposes of spirituous liquors lawfully possessed, otherwise than under a physician's prescription, and neither Act purports to regulate the giving of advice in regard to such use except in the case of physicians' prescriptions.

THIRTEENTH: Complainant is advised and respectfully represents to the Court as matter of law, that so much of the National Prohibition Act as purports to prohibit physicians from advising or prescribing the use, internally, for medicinal purposes by any person of more than one pint of spirituous liquor within any period of ten days, and so much of the said Act entitled "An Act supplemental to the National Prohibition Act" as purports to limit the quantity of vinous or spirituous liquor that may be advised or prescribed by a physician for use, internally, for medicinal purposes by any person within the same period, are and each of them is beyond the authority conferred upon Congress by the Eighteenth Amendment to the Constitution of the United States, or otherwise, and are void and of no effect.

FOURTEENTH: The defendants have claimed and publicly stated that they will prevent, and have threatened by legal proceedings charging complainant with crime and attempting to subject him to fines and imprisonment, to prevent the complainant from prescribing for use as medicine to be taken internally by any patient within any period of ten days, more than one pint of spir-

ituous liquor, even though in complainant's best judgment, after careful physical examination of the patient, such use is necessary in order to afford relief from some known ailment. Such threatened proceedings would seriously interfere with complainant's ability to practice his profession and would subject him to irreparable damage.

FIFTEENTH: The threats and public statements herein complained of are directed not only against plaintiff, but against other physicians of like belief and judgment in respect to the matters aforesaid, under like circumstances, and are therefore a matter of common concern to many physicians and to many patients. At a meeting of the Association for the Protection of Constitutional Rights, an association of physicians having an extended and responsible practice, there was duly adopted a resolution, of which a copy, with the names of some of the members of said Association, is hereto annexed, marked "Exhibit A."

SIXTEENTH: For the matters herein alleged the complainant has no adequate remedy at law.

WHEREFORE, the complainant respectfully prays an injunction, both permanent and temporary, restraining the defendants from interfering with complainant in his acts as a physician in prescribing vinous or spirituous liquors to his patients for medicinal purposes, upon the ground that the quantities prescribed for the use of any one person in any period of ten days exceed the limits fixed by said Acts, or either of them.

And the complainant prays that the Court by its decree declare unconstitutional so much of the Act

of Congress designated as the National Prohibition Act and so much of the Act of Congress signed by the President on the 23rd day of November, 1921, entitled "An Act Supplemental to the National Prohibition Act," as are herein complained of.

And the complainant further prays for such other and further relief as may be just, including such preliminary restraining order as will protect the complainant's rights; and further prays that a writ of subpoena issue herein, directed to the above-named defendants, commanding them on a day certain to appear and answer this complaint.

DAVIES, AUERBACH & CORNELL,  
Attorneys for Complainant,  
34 Nassau Street,  
New York City.

State of New York, }  
County of New York, {ss.:

SAMUEL W. LAMBERT, being duly sworn, deposes and says that he is the complainant in the foregoing action, that he has read the complaint herein, and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

SAMUEL W. LAMBERT.

Sworn to before me this }  
day of November, 1922. }  
                                  }

## EXHIBIT A.

At a meeting of the Association for the Protection of Constitutional Rights, after full discussion and deliberation, the following Resolution was adopted:

WHEREAS, The Eighteenth Amendment to the Constitution of the United States provides only that

"After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited";

and

WHEREAS, in such Amendment there is no restriction, directly or indirectly, of the right of physicians to issue prescriptions for alcoholic liquor; and

WHEREAS, Section 7 of Title II of the National Prohibition Act, purporting only to carry said Amendment into effect, provides as follows:

"Sec. 7. No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford relief to him from some known ailment. Not more than a pint of spirituous liquor to

be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once. Any pharmacist filling a prescription shall at the time indorse upon it over his own signature the word 'cancelled,' together with the date when the liquor was delivered, and then make the same a part of the record that he is required to keep as herein provided";

and

WHEREAS, subdivision (a) of Section 77 of Article XIII of the Regulations to said Act, in assumed furtherance of said Act, provides as follows:

"(a) No prescription may be issued for a greater quantity of intoxicating liquor than is necessary for use as a medicine by the person for whom prescribed, and in no case may spirituous liquor in excess of 1 pint within any period of 10 days be prescribed for the same person by one or more physicians. Further, where spirituous liquor is being administered to any person by any physician or physicians as provided in section 71, the aggregate quantity so administered and the quantity prescribed for any such person may not exceed 1 pint within any period of 10 days";

and

WHEREAS, Section 71 of the said Regulations provides that

"Physicians may obtain not more than 6 quarts of liquor during any calendar year to be administered to their patients only in the

quantities necessary to afford relief at the time of administering";

and

WHEREAS, the purport of such Section 7 of Title II of said Act is repeated in Section 2 of An Act entitled "An Act Supplemental to the National Prohibition Act"; and

WHEREAS, this Association is advised that the alleged justification for such provisions of the Act and Regulation is, that failure so to restrict the right of physicians to prescribe alcoholic liquor as a medicine would necessarily operate to defeat the enforcement of the Volstead Act; and

WHEREAS, such a view is not only unjustified, but is a wholly unwarranted reflection upon the good faith of the Medical Profession of America as a whole; and

WHEREAS, the right to practice medicine is a Constitutional right; and, in the opinion of a vast number of physicians the administration of alcoholic liquor is essential for patients *in extremis*, for prolongation of life and for promoting recovery during convalescence, and that such administration is prevented by such Act and Regulation;

NOW, THEREFORE, BE IT

RESOLVED, that it is the sense of this Association that the constitutionality of such provision of the Act and the validity of such Regulation be forthwith submitted to the courts; and that this Association request its president, Dr. Samuel W. Lambert, under advice of counsel, to institute litigation to this end, in the interest of the public health and the preservation and prolongation of life,

and for the vindication of the rights and honor of the profession; and it is

FURTHER RESOLVED, that the members of this Association, however, favor and will advocate the enactment of such Regulations as will require physicians prescribing alcoholic liquor in such amounts as they deem proper, to file any and all prescriptions with properly designated Governmental authorities, in order that any abuse by unworthy practitioners of the right to administer alcoholic liquor may be prevented and the offenders adequately and summarily punished.

Brewer, George E.	Edgar, J. Clifton
Brooks, Harlow	Erdmann, John F.
Biggs, Hermann M.	Ewing, James
Brown, Samuel A.	Farrell, Benjamin P.
Brill, Nathan E.	Fisher, Edward D.
Bacon, Gorham	Flint, Austin
Cussler, Edward	Ferdyce, John A.
Caldwell, William E.	Foord, Andrew G.
Carr, Walter Lester	Gibson, Charles L.
Carter, Herbert S.	Gregory, Menas S.
Chetwood, Charles H.	Gorton, James T.
Coakley, Cornelius G.	Goodridge, Malcolm
Carlisle, Robert J.	Hurd, Lee Maidment
Coleman, Warren	Halsey, Robert H.
Chace, Arthur E.	Hartwell, John A.
Cahill, Geo. F.	Hess, Alfred F.
Creevey, Geo. M.	Holden, Frederick C.
Clemens, James B.	Haynes, Royal S.
Darrach, Wm.	Holland, Arthur L.
Downes, William A.	Hitzrot, James Morley
Draper, Wm. Kinnicutt	Hunt, J. Ramsey
Duel, Arthur B.	Hammond, Graeme M.
Dana, Charles L.	Hooker, Ransom S.
Davis, Asa B.	Hoag, Arthur F.
Delatour, Beeckman J.	James, Henry
Dunning, Henry S.	Kast, Ludwig
Draper, George	Keyes, Edward L., Jr.
Einhorn, Max	Lusk, William C.

Lyle, Wm. G.  
Lambert, Alexander  
Lambert, Samuel W.  
Longcope, Warfield T.  
Libman, Emanuel  
Lambert, Adrian Van  
Sinderen  
McCarthy, Joseph F.  
McKernon, James F.  
McSweeney, Edward S.  
Manges, Morris  
Norton, Nathaniel R.  
Northrup, William P.  
Norrie, Van Horne  
Nammack, Charles E.  
Niles, Walter L.  
Oppenheimer, B. S.  
Oastler, Frank R.  
Pedersen, James  
Painter, H. McM.  
Patterson, Henry S.  
Pulley, William J.  
Reese, Robert G.  
Russell, James I.  
Roberts, Dudley

Shelby, E. P.  
Sondern, Frederic E.  
Smith, Harmon  
Squier, J. Bentley  
Studdiford, William E.  
Stewart, George D.  
Smith, Thomas A.  
Sayre, Reginald H.  
Saunders, T. Laurance  
Sacks, Bernard  
Taylor, Howard C.  
Tilney, Frederick  
Tyson, H. H.  
Taylor, Fielding L.  
Vaughan, Harold S.  
Wightman, Orrin S.  
Wallace, George B.  
Wadham, Samuel M.  
Wilcox, Herbert B.  
Wheelwright, Joseph S.  
Whipple, Allen O.  
Winter, Henry Lyle  
Zinsser, Hans  
Zabriskie, Edwin G.

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

SAMUEL W. LAMBERT,  
Complainant,

*against*

EDWARD C. YELLOWLEY, as Acting  
Federal Prohibition Director;  
DAVID H. BLAIR, as Commis-  
sioner of Internal Revenue,  
and WILLIAM HAYWARD, as  
United States Attorney,  
Defendants.

**COMPLAINANT'S BRIEF.**

Complainant sues for an injunction restraining defendants from interfering with him in the practice of his profession by prescribing liquor to his patients for medicinal purposes.

The suit involves the question of the authority of Congress, in enforcing the Eighteenth Amendment relating solely to the prohibition of intoxicating liquor "for beverage purposes," to prohibit its prescription as a medicine by physician to patient.

The issues arise upon a complaint and answer, under defendants' motion to dismiss. Such motion admits the facts alleged in the complaint (*Street v. Lincoln Safe Deposit Co.*, 254 U. S., 88, at 89).

**Statement of Facts.**

The complainant—of peculiar distinction in his profession—is a physician admitted to practice in the year 1885 under and pursuant to the laws of the State of New York, the sovereignty having jurisdiction in such matters. The complainant, by virtue of training and studies and compliance with the State regulations, acquired the right to practise medicine in the healing and cure of the sick and in the protection of human beings against attacks of disease. He has been continuously in the practice of such profession and enjoys a good reputation and standing as a physician.

It is alleged in Paragraph Sixth of the complaint that it is an essential part of complainant's right as a physician and of his duty towards his patients to treat their diseases and to promote their physical well-being according to the untrammelled exercise of his best skill and scientifically trained judgment, and, to that end, to advise the use of such medicines and medical treatment as in his opinion are best calculated to effect their cure and establish their health. The answer, in respect of this allegation, denies that it is an essential part of complainant's right as a physician or of his duty towards his patients to prescribe any medicine or medical treatment which it is contrary to law to prescribe, "even though such medicine and medical treatment are, in his opinion, best calculated to effect the cure and establish the health of the patients."

The complaint alleges that it is the belief and judgment of the complainant, based on his experience and observation and the study of medical

science, that the use as a medicine of spirituous liquors, to be taken internally, is, in certain cases, necessary for the proper treatment of patients in order to afford relief from known ailments. The answer does not deny these allegations, but quite irrelevantly, asserts, that it is the belief and judgment of a large number of reputable physicians that the use of spirituous liquors is never necessary for the proper treatment of patients in order to afford relief from ailments.

The complaint sets forth that in prescribing drugs and medicines, the determination of the quantity to be used involves a consideration of the physical condition of the patient, and of the probable effect thereon of such drugs and medicines in each specific case.

"It is the belief of complainant, based upon his experience and observation and the study of medical science, that in the use of spirituous liquors as medicine it is in certain cases, including cases now under complainant's observation and subject to his professional advice, necessary, in order to afford relief from some known ailment, that the patient should use internally more than one pint of such liquor in ten days, and that it is in certain cases necessary for proper medical treatment that the patient should use internally some spirituous liquor without delay, notwithstanding that within a preceding period of less than ten days the patient may have received and used more than one pint of such liquor. Complainant conceives it to be his duty and intends, unless restrained by lawful authority, to issue prescriptions in such cases according to his best skill and judgment."

The answer does not deny these allegations, but,

with like irrelevancy, asserts that large numbers of eminent, reputable physicians deny that spirituous, intoxicating liquors have any value as medicine; and the defendant further alleges on information and belief, that the prescription of more than one pint of such liquor in ten days for any complaint is not considered necessary by any large number of reputable physicians in the United States.

The complaint alleges, and the defendants admit, that complainant has never prescribed and does not intend to prescribe the use of liquor for beverage purposes; that complainant does not intend to advise or prescribe the use of liquor as a medicine unless, after a careful physical examination of the patient, he in good faith believes that the use of such liquor as medicine by the patient is necessary and will afford relief to him from some known ailment. (Complaint, Paragraph Tenth.)

The complaint then sets forth the provisions of the National Prohibition Act and of the supplemental Act prohibiting the prescription of spirituous liquor by a physician to a patient in amounts of more than one pint within a period of ten days or containing more than one-half pint of alcohol. (Complaint, Paragraphs Eleventh and Twelfth.)

It is then alleged in Paragraph Thirteenth of the complaint that so much of such Acts as prohibits physicians from advising or prescribing the use of more than one pint of spirituous liquor within any period of ten days, is beyond the authority conferred upon Congress by the Eighteenth Amendment to the Constitution, and is void and of no effect.

The threats of the defendants to enforce these provisions of the Acts against the complainant and against physicians similarly situated are set forth in Paragraphs Fourteenth and Fifteenth.

The issue is therefore clearly presented on the pleadings and on the motion to dismiss. The qualifications of complainant to practice medicine and his belief in the necessity of prescribing spirituous liquor in excess of one pint in ten days in the cure of his patients and in the cure of patients now under his charge, are admitted. The situation is not qualified or changed by the assertion on the part of the defendants that other physicians, who have not these patients in charge, are not so situated or do not find it necessary in their opinion to give such prescriptions.

A representative character has been given to the suit by the fact that the complainant sues not only on his own behalf but in association with a large number of physicians of standing who find themselves prohibited from rendering to their patients the essential service dictated by their best skill and judgment.

The resolution of the physicians in this matter is attached to the complaint and marked "Exhibit A."

The particular part of the Prohibition Act involved in this suit (Section 7 of Title II) is as follows:

"No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the

use of such liquor as a medicine by such person is necessary and will afford relief to him from some known ailment. *Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days.*"

The Eighteenth Amendment, which is the claimed source of Congressional power in the matter, is as follows:

"Section 1.—"After one year from the ratification of this article the *manufacture, sale or transportation* of intoxicating liquors within, the *importation* thereof into, or the *exportation* thereof from the United States and all territory subject to the jurisdiction thereof *for beverage purposes* is hereby prohibited."

Section 2.—"The Congress and the several States shall have concurrent power to enforce this article *by appropriate legislation.*"

#### **POINT I.**

**The Eighteenth Amendment does not prohibit or authorize the prohibition of prescriptions by physicians of liquor for medicinal purposes.**

(a) *Rules of construction.*

The right to practice medicine is a property right. The power of regulating it falls within the police power of the separate States.

In the leading case of *Dent v. West Virginia*, 129 U. S., 114, the United States Supreme Court upheld the requirements imposed by the State Legislature of West Virginia that persons desiring to practice medicine fulfill certain qualifications and secure a certificate from the State Board of Health. In the

course of the opinion by Mr. Justice Field the nature of the right to practice medicine was passed upon by the Court (p. 121) :

"It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. *The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken.*"

See also to the same effect:

*Watson v. Maryland*, 218 U. S., 173.

The regulation of this matter falls within the police power reserved in the separate states.

*Meffert v. Packer, et al.*, 195 U. S., 625;  
*Hawker v. New York*, 170 U. S., 189.

Any authority of Congress in the matter must find its source in the Eighteenth Amendment; for by virtue of Article X of the Constitution, powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively, or to the people.

Congress has no plenary power in the premises and has no police power on either the subject of

liquor or on the subject of the practice of the medical profession.

Mr. Justice Brandeis, in *Hamilton v. Kentucky Distilleries*, 251 U. S., 146, at 156, said:

"That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true."

See also *Kansas v. Colorado*, 206 U. S., 46, at 87.

Inasmuch as there is no plenary power on the part of Congress upon these subjects, any grant of power to Congress is in its very nature to be held within the limitations and terms of the grant. There is no justification for ignoring limitations, particularly in view of the fact that to do so would infringe upon the police power reserved to the States.

In *Barbier v. Connelly*, 113 U. S., 27, this Court, per Field, J., at page 31, said:

"But neither the Amendment (Fourteenth Amendment)—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes called its police power, to prescribe regulations to promote the health, peace, morals, education, and general order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity."

See also:

*Coosaw Mining Co. v. South Carolina*, 144 U. S., 550, 561;

*United States v. Herron*, 20 Wall., 251, 263.

The purpose of the Eighteenth Amendment is clearly indicated and declared, and the limitations

upon the grant of power from States to Federal Government are unambiguously defined. Such limitations have an added force in the fact that there is not involved in the question merely an interpretation of the intention of the Federal Congress. The Amendment, being drawn by the Federal Congress, was submitted to the Legislatures of the different States for ratification. Its character as a constitutional amendment depends upon such ratification. Such ratification was granted upon the particular terms and limitations now to be found in it, and were conditioned upon such form and phraseology. There is, therefore, no justification in placing a meaning upon the Amendment broader or in any way different from that which must have been understood by the different State Legislatures when it was submitted to them for adoption.

(b) *Medical prescription not one of the five relationships prohibited.*

A reading of the Amendment discloses a clear limitation to five named relationships. It would have been a simple thing to attempt to express a prohibition against all relationships in alcoholic liquor. It is therefore clear that the *manufacture*, *sale* or *transportation* of intoxicating liquors within the United States, the *importation* into the United States and the *exportation* from the United States, were all intended to be prohibited. It is equally clear that the *prescription* of alcoholic liquors for medicinal purposes, a common and long-recognized relationship to liquor, not being prohibited in the Constitutional Amendment, and not fairly included among any

of the five stated relationships, were not intended thereby to be prohibited.

The prescription of liquor as a medicine is such a long-recognized relationship thereto that there is no justification on any strained construction of the language of the Amendment in including it within the classes specified. There was hardly a person of maturity at the time of the passage of this Amendment who at some time had not had liquor prescribed to him by his physician for some ailment. The omission of this class of relationship should therefore be controlling on the Courts in interpreting the meaning of the Amendment.

As the Court said in *United States v. Harris*, 177 U. S., 305, at 309:

"It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute."

(c) *Medicinal purpose not a beverage purpose.*

The Eighteenth Amendment contains a further clearly defined limitation, which modifies and controls each of the five definite classes of prohibited relationships. Neither manufacture nor sale nor transportation of intoxicating liquors are prohibited unqualifiedly and for all purposes. They are prohibited for one specific class of purpose. They are prohibited "for beverage purposes." Here, also, it would have been easy to seek to have made a general and sweeping prohibition. And, where commonly and through long periods of

time liquor had been used for a variety of different purposes, while the prohibition is directed to but one purpose, it is a recognition that the unspecified purposes are not prohibited. The phrase has no other meaning than as a limitation. Especially must this be so where, save for such Amendment, jurisdiction over the remainder and residue of the subject is in other sovereignties.

The construction of the language of the Amendment in this particular cannot be the subject of doubt. The term "for beverage purposes" was, at the time of the adoption of the Amendment, a term of clear import and accepted meaning. It had been used time and again in liquor legislation. It had been construed in judicial decisions. It was a term which not only did not include prescription for medical purposes, but which had been customarily used in contradistinction to prescription for medicinal purposes. **Beverage purpose was the antithesis of medicinal use.**

In *Commonwealth v. Mandeville*, 142 Mass., 469, the defendant was charged with violating a restricted license under which he was permitted to sell spirituous liquirs solely for medicinal, mechanical and chemical purposes and under which he had no right to sell intoxicating liquors "as a beverage." The Court, per Holmes, J., said (p. 469) :

"It is argued that a beverage is only a drink, and that liquors sold for medicinal purposes are sold to be used as a drink. But it is also argued that it may be necessary that liquors sold for medicinal purposes should be drunk on the premises. But, taking the whole instruction together, the meaning of the court was perfectly plain, and was correct. *Sales of*

*liquors to be used as a beverage were spoken of by way of antithesis to sales for medicinal purposes, and signified sales of liquors to be drunk for the pleasure of drinking, as distinguished from sales of liquors, to be drunk in obedience to a doctor's advice."*

In *Gue v. City of Eugene*, 100 Pac., 254 (Oregon), the statute involved contained the following provision:

"It shall be unlawful for any person, firm, company, or corporation to sell, barter, or give away to any person or persons whomsoever within the city of Eugene, any intoxicating liquor, provided, however, nothing herein contained shall prohibit the sale of pure alcohol for scientific or manufacturing purposes, or wines to church officials for sacramental purposes, nor alcoholic stimulants as medicine in cases of actual sickness. \* \* \* Nothing in this ordinance shall be construed to prevent one registered pharmacist selling such alcoholic liquors to another registered pharmacist."

The Court, in interpreting this section, said (p. 256) :

"'The use of liquor as a beverage,' say the editors of Words and Phrases (Volume 1, p. 76), 'does not mean simply that the same is to be drunk, but the word "beverage" is used to distinguish the act of drinking liquor for the mere pleasure of drinking from its use for medicinal purposes.' The phrase, 'for beverage purposes,' as used in the complaint, signifies a sale of malt liquor to a person in order to gratify an appetite for intoxicants, or for the mental exaltation or for the physical effect which the imbibing of a stimulant immediately affords, as contradistinguished from

a sale of such liquor for any of the objects authorized by the section of the ordinance under consideration. The complaint, in our opinion, sufficiently negatived any lawful sale of the liquor specified."

See, also:

*State v. Roach*, 75 Me., 123; and

*State v. Costa*, 62 Atl. (Vt.), 38 (*infra*).

In *Busch & Co. v. Webb*, 122 Fed., 655 (appeal dismissed 194 U. S., 640), the District Judge, in declaring that such portion of a State statute was unconstitutional which prohibited physicians not in active practice from prescribing liquor as a medicine, quoted with approval from the opinion in *Bowman v. State*, 40 S. W., 796. In that case the Court, construing a prohibition amendment to the State Constitution, said:

"It is a familiar rule of construction, applicable alike to statutes and constitutions, that all laws are to be construed with reference to the existing evils to be remedied. In passing the constitutional provision in question, there was *no existing evil in a sale of intoxicants as medicines or for sacramental purposes*. By reference to the history of those times, it will be seen that the restriction and the abolition of saloons was the subject aimed at. \* \* \*

Now, we take it, in adopting the provisions of the Constitution in question, the people intended to prohibit the liquor traffic, and, because the language used is general and comprehensive, it was not intended to put a limitation upon the Legislature to authorize the sale or disposition of liquor for purposes that were necessary and not harmful. When our people adopted this constitutional amendment, we were not unmindful that this was a

Christian country, in which the orthodox religion was the basis and substrata of our civilization, and to be considered *pari materia* with this provision of our Constitution they had in view, Section 6 of the Bill of Rights, which, among other things, provides: 'All men have the natural and indefeasible right to worship Almighty God according to the dictates of their own consciences,' etc., and further provides: 'And no human authority ought in any case whatever to control or interfere with the rights of conscience in the matter of religion, and no preference shall be given by law to any religious society or mode of worship.' It was not proposed to abolish the sacrament, which is one of the fundamental ceremonies of our religion, which idea would be involved in the construction sought—that wines could not be bought or sold for sacramental purposes. *It was further known at the time that alcohol in various forms was in common use among the people, in case of sickness, for medical purposes; alcohol in various forms entering into combination with many of the most useful medicines belonging to the profession. These were not evils to be provided against, but privileges to be conserved, and it is not inimical to a proper construction of the provisions of the Constitution in question to interpret it in the light of the surrounding circumstances under which it was adopted.*"

In *Thomasson v. The State*, 15 Ind., 449, in interpreting a statute of absolute prohibition, the Court held, to quote the headnote:

"Though the law of March 5, 1859, regulating the sale of spirituous liquors, contains no exception of sales made for medicinal or sacramental purposes, the Court will make the exception in proper cases."

(d) *Prohibition Act recognizes that medical purpose is not a beverage purpose.*

The distinction between beverage purposes and prescription as a medicine is recognized in the National Prohibition Act and in the Act supplemental to the National Prohibition Act.

In the National Prohibition Act, in Section 1 of Title II, intoxicating liquor is defined as including certain named varieties containing one-half of one per centum or more of alcohol by volume "which are fit for use for beverage purposes." In Section 3 of Title II it is provided that, "All the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented." In the same section liquor "for non-beverage purposes" and wine "for sacramental purposes" are allowed to be manufactured and dealt in as in the Act provided. In Section 4 it is stated that certain therein enumerated articles are not to be subject to the provisions of the Act. Among those mentioned are medicinal preparations which are "unfit for use for beverage purposes," patent and proprietary medicines that are "unfit for use for beverage purposes," toilet, medicinal and antiseptic preparations and solutions that "are unfit for use for beverage purposes." It is in the same section further provided that any person who shall knowingly sell any of the aforementioned articles "for beverage purposes" or any extract or syrup "for intoxicating beverage purposes," shall be subject to the penalties provided for in the title.

The distinction between beverage purposes and medicinal purposes is further drawn in Section 6

of the Act which provides that no one shall manufacture, sell, purchase, transport or prescribe any liquor without first obtaining a permit from the Commissioner so to do, "except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician as herein provided."

In the same section it is provided that "no one shall be given a permit to prescribe liquor unless he is a physician duly licensed to practice medicine and actively engaged in the practice of such profession." Here, also, the distinction between beverage purposes and medicinal use is drawn, for it is provided, "No permit shall be issued until a verified written application shall have been made therefor, setting forth the qualification of the applicant and the purpose for which the liquor is to be used." In the same section the distinction between beverage purpose and sacramental purpose is drawn, for it is provided, "Nothing in this Title shall be held to apply to the manufacture, sale, transportation, importation, possession or distribution of wine for sacramental purposes or like religious rites, except Section 6 (save as the same requires a permit to purchase) and Section 10 hereof, and the provisions of this Act prescribing penalties for the violation of either of said sections." The head of ecclesiastical jurisdiction is given authority to designate any rabbi, minister or priest to supervise the manufacture of wine to be used "for the purposes and rites in this section mentioned."

And, as pointed out under Point VII of the Brief, this method of dealing with the ecclesiastic authority to distribute—and even manufacture—sacramental wines, is the only constitutional way of

dealing with the use of alcoholic liquor for medicinal purposes. That is, by enacting such reasonable and appropriate provisions or regulations as are directed to the detection and adequate punishment of the unworthy physician who—under the subterfuge of prescribing alcoholic liquors for medicinal purposes—violates the Act by diverting them for the prohibited beverage purpose.

Section 7, which contains the prohibition herein complained of, even in making such prohibition recognizes the use of liquor as a medicine: "No one but a physician holding a permit to prescribe liquor shall issue any prescription for liquor. And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that *the use of such liquor as a medicine* by such person is necessary and will afford relief to him from some known ailment. Not more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days and no prescription shall be filled more than once." The section further provides that the physician who issues the prescription for liquor shall keep a record, alphabetically arranged in a book prescribed by the Commissioner, which shall show the date of issue, amount prescribed, to whom issued, "*the purpose or ailment for which it is to be used* and directions for using, stating the amount and frequency of the dose."

Section 8 provides: "No physician shall prescribe and no pharmacist shall fill any prescription for liquor except on blanks so provided, except in

cases of emergency, in which cases a record and report shall be made, and kept as in other cases."

In Section 27, intoxicating liquors "for medicinal, mechanical, or scientific uses," is recognized.

The Act Supplemental to the National Prohibition Act recognizes the distinction between medicinal purposes and ~~beverage~~ purposes. In Section 2 it provides "that only spirituous and vinous liquor may be prescribed for medicinal purposes, and all permits to prescribe and prescriptions for any other liquor shall be void." The physician is prohibited from prescribing "more than one-half pint of alcohol, for use by any one person within any period of ten days. No physician shall be furnished with more than 100 prescription blanks for use within any period of ninety days, nor shall any physicians use any more than that number of prescriptions within any such period unless on application therefor he shall make it clearly apparent to the Commissioner that for some extraordinary reason a larger amount is necessary, whereupon the necessary additional blanks may be furnished him." The same section provides for a change of formula in case it is made to appear to the Commissioner that any article, either medicinal preparation or proprietary medicine or other article specified in Section 4 of the National Prohibition Act, "is being used as a beverage, or for intoxicating beverage purposes."

The section further recognizes the distinction between beverage purposes, which it is the general intent of the National Prohibition Act to prohibit, and a current need for "all non-beverage uses": "No spirituous liquor shall be imported into the United States, nor shall any permit be granted authorizing the manufacture of any spirituous

liquor, save alcohol, until the amount of such liquor now in distilleries or other bonded warehouses shall have been reduced to a quantity that, in the opinion of the Commissioner, will, with liquor that may thereafter be manufactured or imported, be sufficient to supply *the current need thereafter for all non-beverage uses.*"

The distinction between beverage purposes and medicinal purposes apparent in the Eighteenth Amendment and recognized in the National Prohibition Act and in the Act Supplemental to the National Prohibition Act, is emphasized in the case at bar by the defendants' admission of the Tenth Paragraph of the complaint, which alleges:

"Complainant has never prescribed and does not intend to prescribe the use of liquor for beverage purposes. Complainant does not intend to advise or prescribe the use of liquor as medicine unless, after careful physical examination of the patient, he in good faith believes that the use of such liquor as medicine by the patient is necessary and will afford relief to him from some known ailment."

The National Prohibition Act, in prohibiting a prescription by a physician to a patient of more than one pint of alcoholic liquor in a period of ten days, and the Act Supplemental to National Prohibition, in prohibiting the prescription by a physician to a patient of more than one-half pint of alcohol in any period of ten days, are without any qualifications or provisos.

**They do not purport to be regulations, but are in terms and in effect prohibitions.**

In the event that the patient in the preceding nine days has had, on doctor's prescrip-

tion, one pint of alcoholic liquor, he cannot on the tenth day, no matter what his need or his physician's trained opinion as to his necessities, have one drop more. His illness may take a sudden turn for the worse. An entirely new ailment may intervene, making prescription essential to prevent death. The Act contains no exceptions or qualifications. *The prohibition is absolute.*

These prohibitions find no justification in the Eighteenth Amendment. They are beyond each and all of the five specified relationships in liquor which the Eighteenth Amendment prohibits. They are furthermore, entirely outside of the general limits set forth in such Eighteenth Amendment, that the prohibition be a prohibition "for beverage purposes."

Although no case involving this particular question has, so far as we have been able to ascertain, been presented, the recitals of the courts as to the meaning of the Eighteenth Amendment show that the plain meaning herein urged has been in mind. Thus, in *Cornelii v. Moore*, 257 U. S., 491, the Court, per McKenna, J., summarizing the Amendment and the legislation under it, said:

"Before considering the provisions here specially involved, we may say that the act has been sustained, and it has been decreed that the power of Congress can be asserted against the disposal *for beverage purposes* of all liquor manufactured before the Amendment became effective, as it can be asserted against subsequent manufacture *for those purposes*. Either case is within the constitutional mandate and prohibition."

**POINT II.**

**The salutary principle laid down in Purity Extract Co. v. Lynch, 226 U. S., 192 (sometimes referred to as authority for the prohibition of physician's prescriptions), and adopted in the reasoning of the Court in Ruppert v. Caffey, hereinafter discussed, has no application to this case.**

The State of Mississippi had forbidden the sale of malted liquors; and the Courts of that State held that there was the accompanying right to prohibit the sale of any kind and condition of malted liquors for beverage purposes whether or not intoxicating. The Supreme Court of the United States sustained the decision of the Courts of Mississippi.

Judge Hughes, in his illuminating opinion said (p. 204) :

"It was competent for the legislature of Mississippi to recognize the difficulties besetting the administration of laws aimed at the prevention of traffic in intoxicants. It prohibited, among other things, the sale of 'malt liquors.' In thus dealing with a class of beverages which in general are regarded as intoxicating, it was not bound to resort to a discrimination with respect to ingredients and processes of manufacture which, in the endeavor to eliminate innocuous beverages from the condemnation, would facilitate subterfuges and frauds and fetter the enforcement of the law."

No other conclusion, either by the Courts of the State of Mississippi or by the Supreme Court of the United States, could reasonably have been expected.

Suppose, however, that Poinsetta, the prohibited malted preparation, had been for medicinal purposes, and was to be sold only on physicians' prescriptions pursuant to careful regulations, so that the violation of the Act of Mississippi against the use of intoxicating liquor for beverage purposes, would not have been promoted. Then, under the numerous cases cited in this brief, it is clear beyond argument that not even the State of Mississippi would have been authorized to forbid its use. And if the Courts of that State had held to the contrary, then clearly the Supreme Court would have reversed any such decision—under the very principle of the *Purity Extract* case itself.

In order to hold that Congress under the delegated police powers from the States, pursuant to the Eighteenth Amendment, could legislate as to the prohibition of medicinal prescriptions, it must be held that it thereby possesses a power which the States themselves never intended—and even were unable—to confer by legislative action.

**Moreover, in the present case the most convincing medical authority is to be found in the Appendix, to the effect that, at times, it is essential to administer alcohol through the rectum.**

In order, therefore, to have the inhibition of the Volstead Act concerning medical prescriptions upheld, the words "appropriate legislation," in the Amendment, must be construed as entitling Congress, under its commission to prevent the use of *intoxicating liquors for beverage purposes*, to forbid the administration of alcohol by means even of the nutritive or stimulating enema.

Perhaps unreason may attain to a more superlative degree in asserting that the legislation com-

plained of is "appropriate"; but we submit that the most resourceful sophistry could not conceive of it.

### POINT III.

**To deprive the sick of their medicine, which in the opinion of their physician, however administered, is essential to their cure, is not a justifiable exercise of police power in preventing the use of alcoholic liquor for beverage purposes.**

Practically every citizen of the United States living in civilized communities and within reach of physicians, will sooner or later have to rely upon their best skill and scientifically-trained judgment. As each crisis arises the patient naturally demands that as his right; and it would seem fundamental that the sick should be entitled to the best that medical science can offer in their cure. To deny this service from any motive whatsoever would seem to savor of inhumanity. When the issue is life or death with an individual, general motives of public policy concerning third parties would seem to be remote.

Cases are recognized where, due to some sudden calamity, a man's private property must be sacrificed for the public good. His house may be destroyed to prevent the spread of plague or fire, and he has no remedy. His property is held subject to the welfare of the general public. It is also recognized that in time of war, when the existence of society is at stake, the life of each member is at the command of the Government. In time of peace, however, when there is no emergency or

impending calamity, the Government is without right to deprive one man of his life for what it may deem a general public advantage, when the deprivation of the life is not based upon any theory or fault or wrongdoing in the individual. If this power is to be found in government, particularly in a government of defined powers, it would seem that the guaranty of life has become merely rhetorical.

The question in the case at bar is further emphasized by the fact that such power is asserted, not under a plenary police power, but under a carefully defined and limited grant of power from the States to the Federal Government. *The power of depriving one man of his life certainly cannot be derived from the power of preventing other persons from drinking intoxicating liquor for pleasure.*

It is not in any theoretic or technical sense that this case presents the issue of life and death. The National Prohibition Act recognizes the use of alcoholic liquor as a medicine on a physician's prescription, but has so prohibited the amount in any period of time that its use as a medicine in the general run of cases is made impossible.

On the very face of the Act itself appears the most daring discrimination with regard to the medicinal use of alcohol. The limitation which is imposed upon physicians in prescribing and administering intoxicating liquor is not placed upon sanatoriums and similar institutions. In short, under the act a patient may not receive the amount of intoxicating liquor his physician deems *necessary*, if that should be more than one pint of liquor

in ten days, but if the patient can secure admittance to or be removed to a sanatorium, the restriction is lifted. The indefensible character of this inconsistency requires no further argument. The statement itself is the argument.

The absolute prohibition of the prescription of alcoholic liquor as medicine by physician to patient in amounts of more than one pint in ten days (one-half pint of alcohol in ten days), is particularly arbitrary when compared with the provisions of the same acts for the use of wine for sacramental purposes. Here no necessity of physical life or death or health is involved. Yet no limitation is placed upon rabbi, minister, rector or priest in religious rites. The numbers of communicants are not specified; the times of the ceremonies are not prescribed. Amounts in excess of certain amounts are not prohibited. In other words, the whole use is the subject of regulation, rather than prohibition. A proper regard is shown for religious liberty without basing it upon any view as to the efficacy of any particular ritual.

The prohibitions in the Act on the subject of prescriptions of alcoholic liquor are doubly arbitrary when compared with legislations on the subject of drugs or criminal operations.

In the recent case of *United States v. Doremus*, 249 U. S., 86, where the Harrison Drug Act was before the Court, it will be noticed that such Act excepted from its provisions the dispensing of drugs to patients by physicians.

So, also, the State statute on the same subject before the Court in *Whipple v. Martinson*, 256 U. S., 41, made a similar exception of administration or prescription of drug to patient by physician.

Even in legislation on the subject of criminal operations exception is either specified or construed by the courts as existing in case the operation is, on the advice of a physician, necessary to save life. *Commonwealth v. Sholes*, 13 Allen, 554.

The need of one pint on physician's prescription is recognized in the statute. In the event, however, that the physician, in his professional opinion, regards two pints as essential to the saving of life, the law compels him to give one-half of the necessary amount. This, surely, cannot be on any theory that the patient he is treating and of whose necessities he is the sole judge, does not in fact need the two pints. It must be upon some theory that the patient who needs it may not get it, but that there is a hazard that someone else who does not need it may use it for beverage purposes. This hazard of abuse, if it exists, certainly is not a proper basis for prohibition as distinguished from regulation. To classify one pint as medicinal, and two pints of the identical substance as non-medicinal, is purely arbitrary.

If as the Court has said in the National Prohibition Cases, 253 U. S., 350, at 387, "there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement" certainly the limit is transcended when liquor absolutely and without exception is prohibited for medicinal purposes where the patient in the preceding nine days has been given one pint on prescription. The prohibition of prescription here involved is beyond any power granted by the Amendment.

*Freund, Police Power*, page 210, §223:

"All prohibitory laws make an exception in favor of sales for medical purposes. This is not a legislative indulgence but a constitutional necessity, since *the state could not validly prohibit the use of valuable curative agencies on account of a remote possibility of abuse.* 'The power of the legislature to prohibit the prescription and sale of liquor to be used as medicine does not exist, and its exercise would be as purely arbitrary as the prohibition of its sale for religious purposes.'" (Quoted from *Sarrls v. Commonwealth*, 83 Ky., 327.)

In *State v. Larrimore*, 19 Mo., 391, the statute contained no exception in favor of the sale of liquor by a physician as medicine. Nevertheless it was held that the statute must be so construed as to include such an exception. The Court said in reversing this conviction:

"If this instruction had left the question to the jury, whether the defendant had, in good faith, sold the brandy to a sick person as a medicine, and he had then been convicted, we would not have disturbed the judgment. Physicians are not to become dramshop keepers, under color of their professional practise. *If a physician, upon his professional judgment that a sick person needs brandy, administers it as a medicine, in good faith, and charges for it, he is not to be punished; because such liquor, properly used, is a valuable medicine.* But if he sells it to a man who is well, or sells it to a man who is not well, without exercising his professional judgment, and determining that it is necessary for the sick person, he is indictable. His exemption from the fine is not to rest upon the strong wish of the individual purchasing to have the liquor,

nor merely upon the judgment of such person that the liquor would be useful to him as a medicine, but must be founded upon the judgment of the physician that it is a medicine which the diseased man requires.

"In the present case, the instruction given to the jury makes the defendant liable for selling the glass of brandy, and declares that his being a physician, and having sold it as a medicine, does not excuse him. Now the question which they should have been required to decide was whether he really administered the liquor to a diseased person, as a medicine, upon his professional judgment of its necessity. As given, the instruction might have made the defendant liable in a case in which he should not have been fined."

The distinction between *sales* by physicians (which may be prohibited) and *prescriptions* (which may not be prohibited) is brought out in *Sarrts v. Commonwealth*, 83 Ky., 427, 331-332 (*supra*). In this case the statute permitted physicians to administer and prescribe liquor, but required them to keep certain records, etc. The Court said:

"The social order, health and security of a local community may, in the opinion of the Legislature, require that the selling or giving of spirituous, malt or vinous liquors, to be used as a beverage, be prohibited, as to which, as well as any other subject affecting the health or morals of a community, that department of the government has the power to determine; and it is not inconsistent with that object to authorize the sale of liquors as medicine when necessary for that purpose; on the contrary, while the Legislature has the power to regulate the sale of liquors to be used as a beverage, or to prohibit its sale for that purpose al-

together, *it cannot exercise that power so arbitrarily as to prohibit the use or sale of it as a medicine.*"

And again:

"If the Legislature has the power at all to prohibit the sale of intoxicating liquors by retail, it exists alone because the health, peace and order of society require it; and upon that ground alone this court, without dissent, has heretofore decided it may be exercised; but there being no reason therefor, *the power of the Legislature to prohibit the prescription and sale of liquors to be used as medicine does not exist*, and its exercise would be as purely arbitrary as the prohibition of its sale and use for religious purposes."

In *Union v. States*, 76 Ind., 524, defendant, a druggist, had been convicted of selling whiskey for medicinal use without a license. The conviction was reversed, upon the ground that the sale was not unlawful. The Court said:

"It is true that the statute, under which the appellant was indicted, contains no exceptions authorizing the sales of intoxicating liquors, without license, for medicinal, chemical or sacramental purposes. But it has always been held by this Court, in construing similar statutes, that the courts will exempt, from the prohibitory or penal provisions of the statute, all *bona fide* sales of such liquors for such purposes."

Congress, in prohibiting the prescription by a physician of more than certain rigidly defined amounts in a rigidly defined period of time, therefore, not only exceeded the power exercisable on this particular subject, but clearly exceeded any

power granted it under the Eighteenth Amendment which merely prohibited certain defined classes of relationship in regard to intoxicating liquor for the limited purpose of preventing its use as a beverage.

In *Adams v. Tanner*, 244 U. S., 590, the Court, in regard to an unjustified use of the police power of the State, at 594, said:

"Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation for any one of them by the public. *Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked.*"

In *Children's Hospital of the District of Columbia v. Adkins* (not yet reported), the Circuit Court of Appeals of the District of Columbia, in holding unconstitutional the Minimum Wage Law of the District of Columbia (Act of Congress, September 19, 1918), pointed out that although the act was passed for the benefit of workers, in the particular instance before it, it resulted in the prevention of any employment whatsoever, the Court saying:

"The right of Willie Lyons to contract her labor in any lawful calling is a property right,

of which, if the property clauses of the Constitution mean anything, she cannot be deprived. When the minimum wage of \$71.50 per month for women was fixed by the Board in this District, Willie Lyons was operating an elevator in the Congress Hotel at a wage of \$35.00 per month and two meals per day. As a result, she lost her position. The law worked but one way. The hotel manager was not compelled to employ her at a fixed wage, and her position went to a man, who was willing to perform the service at a lower wage than that fixed by the Board. She was without the power to compel her employment, and, because of her inability to measure up to the minimum scale, the law to promote the good morals and general welfare of the community cast her adrift."

The Court held the law unconstitutional, saying:

"The police power cannot be employed to level inequalities of fortune. Private property cannot by mere legislative or judicial fiat be taken from one person and delivered to another, which is the logical result of price-fixing. As was said by Mr. Justice Pitney, in the Coppage case: 'But the Fourteenth Amendment, in declaring that a State shall not "deprive any person of life, liberty or property without due process of law," gives to each of these an equal sanction; it recognizes "liberty" and "property" as co-existent human rights, and debars the States from any unwarranted interference with either. And since a State may not strike them down directly, it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities, that are but the normal and inevitable result of their exercise, and then invoking the police power in

order to remove the inequalities without other object in view. The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty.'"

In the case at bar the complaint alleges and the answer admits the necessity in the professional opinion of the complainant of prescribing alcoholic liquors in the prohibited amounts. Cases under complainant's observation and subject to his professional advice, as alleged in Paragraph Ninth of the complaint, present such necessities. In each and every case the law constitutes a deprivation of such necessities from the patient. This wrong to the individual is the necessary consequence of the prohibition.

In this case Congress has furthermore reached over into a realm beyond its jurisdiction, and has prohibited prescriptions to the sick where there was no logical relationship to the prevention of the use of alcoholic liquor for beverage purposes.

In *Hammer v. Dagenhart*, 247 U. S., 251, under the child labor legislation of Congress, analogous situation was presented to the Court. The Court, at page 273, said:

"The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.

"The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution."

The Court, at page 276, concluded:

"It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend."

In *Bailey v. Drexel Furniture Co.* (Advance Opinions, June 15, 1922), wherein another act of Congress on the subject of child labor was before the Court, it was said, per Taft, Ch. J.:

"It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not intrusted to Congress, but left or committed by the supreme law of the land to the control of the states. We cannot avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good."

The prohibition Acts place physicians of standing in embarrassing dilemmas as to morality and law. They have to choose between violating not only their moral obligation toward their patients, but violating the substantive law of their State, on the one hand, and violating the terms of the Federal statute, on the other. If a physician gives less than his best judgment in the treatment of his patient, it is not only a moral wrong, but it is a violation of his contract and of his legal duty toward the patient under the substantive law of the State.

Under the law of New York State, he is obligated by his contract *to use his best judgment in the exertion of his skill and the application of his diligence.*

*Carpenter v. Blake*, 10 Hun, 358;

*Carpenter v. Blake*, 50 N. Y., 696;

*Boldt v. Murray*, 2 N. Y. St. Rep., 232.

He is not a physician unless he holds himself out as able not only to diagnose, but to prescribe (Public Health Law, §160).

Dr. Lambert states in Paragraph Ninth of the complaint:

"Complainant conceives it to be his duty and intends, unless restrained by lawful authority, to issue prescriptions in cases according to his best skill and judgment."

An injunction should issue against interference by the public authorities with this duty.

The prohibition of prescriptions contained in the Prohibition Act and the Act supplemental to Prohibition are unconstitutional and void. This result however does not impair the general legislation or even the regulations (as distinguished from prohibition) now contained in the acts on the subject of medical prescriptions. On the contrary, as below stated, complainant and the physicians who adopted the resolution attached to the complaint advocate regulations safeguarding proper prescriptions and preventing any abuse by unworthy practitioners.

#### **POINT IV.**

**Ruppert v. Caffey, 251 U. S., 264—sustaining the definition in the Volstead Act of intoxicating liquors as liquors containing only one-half of one per cent. of alcohol—is no more authority to sustain Congress in having prohibited physicians' prescriptions than is Purity Extract Co. v. Lynch, 226 U. S., 192.**

No other conclusion than that arrived at by the Supreme Court was to be expected.

For under the decisions of many of the Courts of the States which adopted the Eighteenth Amendment, it is clear that any Act of Congress for the enforcement of the Act might, if Congress so chose, thus define intoxicating liquors.

*It was equally clear, however, that under such decisions Congress could in nowise limit the amount of alcoholic liquor which might be prescribed for medicinal purposes.*

It is, of course, common knowledge that prior to the enactment of the Eighteenth Amendment statutes providing for the prohibition or regulation by license of the manufacture and sale of intoxicating liquors for beverage purposes had been passed in nearly every State of the Union. In a great many of the States the means to insure the successful enforcement of the statute had been incorporated into the legislation itself as a provision reducing the alcoholic content of liquors. The legal volume of alcohol declared to be non-intoxicating ranged from the now familiar  $\frac{1}{2}$  of 1% to 2.75% in the various statutes, and in one instance a law of Maryland permitted "4% of alcohol by weight." Undoubtedly the Congress was cognizant of such State legislation and of the decisions which declared that a reduction of the volume of alcohol to a mere scintilla was constitutional and a proper method to secure enforcement. It was within the province of Congress accordingly to adopt similar legislation in providing for the enforcement of the Eighteenth Amendment. In effect the State Legislatures adopting the Eighteenth Amendment sanctioned the use of the same means which they had themselves employed and which had been supported by the decisions of the State courts.

It becomes of conclusive significance, therefore, that in many instances the same States which thus found it lawful to define as intoxicating any liquor which contained more than the statutory content of alcohol, in order that actual prohibition might be realized, *permitted freely the use of otherwise intoxicating liquors as a medicine.*

An example of this so-prevalent situation is to be found in the statutes and decisions of Vermont, one of the first States to adopt regulatory legislation. In 1902 the State Legislature defined intoxicating liquors to include "ale, porter, beer, lager beer, cider, all wines, or any beverage which contains more than 1% of alcohol by volume." (*General Laws, 1917, §6452.*) This definition was sanctioned and enforced by the Courts in the case of *State v. Costa*, 62 Atlantic (Vt.), 38. The Court said:

"If, however, the preparation is capable of being used as a beverage, and is sold or kept for sale with the purpose, intent or understanding that it is to be used as a beverage, then, if it contains more than 1% of alcohol an offense is committed."

It had, however, already been determined in Vermont that the prohibition of drinking liquor for pleasure could not constitutionally be deemed so sweeping as to include certain lawful uses of alcoholic liquors—as, for instance, when prescribed as a medicine. In *Fabor v. Green*, 72 Vt., 117 the Court had held that "the mere fact that the liquid can be and is swallowed does not make it a beverage," and the *Costa* case (*supra*) had very properly determined that the statute did not prohibit medicinal use of alcohol. The Court there held:

"So it must be said, in the case of extracts, tinctures, essences, and compounds having a legitimate use for medicinal, culinary and toilet purposes that the mere presence as a solvent, preservative or otherwise or more than the proportion of alcohol named in the statute does not make the preparation one to which the statute applies. In respect to such articles the inquiry is not simply whether they contain more than 1% of alcohol, but there is the further inquiry whether or not the articles are sold to be used as a beverage."

And if "the mere fact that the liquid can be and is swallowed does not make it a beverage" surely the fact that the liquor is administered as an enema forbids the conclusion or even the thought that it is a beverage.

In Iowa the Legislature passed an act prohibiting entirely the use of beverages containing alcohol. One of the first cases arising under the statute was that of the *State v. Intoxicating Liquors*, 76 Iowa, 243. In sustaining the confiscation of certain liquors which contained "2.42 per cent. of alcohol by weight and 3.02 per cent. by volume; and the other portion contained 2.58 per cent. by weight and 3.22 per cent. by volume," the Court said, per Seevers, C. J. (p. 245) :

*The liquor in question contained alcohol, and therefore it, as a matter of law was intoxicating.*"

On the other hand, the Legislature of Iowa enacted a statute which regulated the sale of intoxicating liquors for medicinal purposes. The Supreme Court of Iowa held in the case of *State v. Aulman*, 76 Iowa, 624, that this was a proper exercise of the legislative function. The Court said (p. 626) :

"The amendments adopted by the act in question were of a character to prevent the sale of intoxicating liquors to be used as a beverage, rather than to secure the public against their improper use as a medicine by reason of the ignorance of the pharmacist."

Similarly in Texas the State Legislature had adopted a sweeping reform permitting the enactment of legislation designed to bring about absolute prohibition. Under this authorization the Legislature submitted to various localities the right to enforce prohibition by local option, but incorporated into this later Act a reservation in favor of sacramental and medicinal use of intoxicating liquors. The Courts of Texas have repeatedly held that both the prohibitory legislation and the subsequent permitted exceptions in favor of wines for the sacrament and for medicine are constitutional. For example the Court said in *McLain v. State of Texas*, 43 Texas Criminal Reports, 213:

"Under the local option law, sales of intoxicants are prohibited, except (1) when used for medicinal purposes, and (2) for sacramental purposes. *The constitutionality of this law was attacked because of these exceptions; the contention being made that, as the constitution had prohibited the sale, therefore the legislature could not make these exceptions.* This court held otherwise in Bowman's Case, 38 Tex. Cr. R., 14; 40 S. W., 796; 41 S. W., 635."

In Rhode Island perhaps the most comprehensive statutes and interpretive decisions are to be found with regard to controlling the liquor traffic. To enforce the prohibition for beverage use of intoxicating liquors a law was passed defining intoxicating liquors as any which contained 2 per

cent. by weight of alcohol. This legislation was found to be constitutional.

*State v. Gravelin*, 16 R. I., 407, at p. 408.

Even the use of alcohol as a medicine was most stringently regulated in Rhode Island; but it is of vital significance that medicinal liquor was not included in the prohibition.

*State v. Duggan*, 15 R. I., 403.

In *Town of Selma v. Brewer*, 9 Cal. App., 70, 76-78, defendant, a pharmacist, was charged with the violation of an ordinance which prohibited, among other things, the keeping, possessing, etc., of liquor.

The Court said:

"It is, we think, a matter of common knowledge, as much so as are the uses to which quinine is medically put, that many, if not all, of the liquors mentioned in this ordinance are often deemed to be necessary to be used for medicinal purposes. Of course, as in the case of certain poisons ordinarily sold at drug stores, *the sale of liquors for medicinal purposes* by pharmacists or druggists *may be*, by *the public authorities, confined to such purposes* and otherwise subjected to proper and reasonable regulation, or to the imposition of such conditions and restrictions as will safeguard, protect and preserve the rights of the public. \* \* \* The sale of opiates and other more drastic poisons, by regularly licensed druggists, is hedged about by restrictions which, as a protection to the public, the law has an unchallengeable right to impose, *but it has never been supposed for an instant that the sale of such drugs could be prevented.*"

In Kentucky it has been held that there is no sanction in the police power for the prohibition of liquor to be used as a medicine or for sacramental purposes. The enforcement of prohibition for beverage purposes could be aided only by proper regulating licensing of medicinal sales—the very contention of the complainant and his colleagues in the present case. Notably in the case of *Commonwealth v. Fowler*, 96 Ky., 166, the Court of Appeals in upholding the right of the state to require licenses from druggists dealing in intoxicating liquors on prescription, said:

"Without governmental interference or consent, we say the farmer may till his soil, the merchant may buy and sell, the lawyer and the doctor practice their professions, and the druggist and pharmacist compound their medicines. And if, by reason of shysters and quacks, an injured people demand protection, or if, because ill-behaved druggists or pretended pharmacists debauch the public morals by dealing out intoxicating liquors and nostrums as beverages, yet the pursuit of these callings cannot be prohibited. The innocent and honest druggist cannot be restrained of his liberty by reason of the dishonest practices of others. His pursuit, being in itself harmless, and, indeed, useful, and capable of being conducted without harm to the public, cannot be prohibited, and this is true of every legitimate act going to make up and constitute his trade or profession. It is as true of his right to fill a prescription for whiskey as a medicine as it is of his right to fill one calling for calomel. As said by this court in *Sarrls v. Com.*, 83 Ky., 332, '*The power of the legislature to prohibit the prescription and sale of liquor to be used as a medicine does not exist, and its exercise would be as purely arbitrary as the prohibition of its sale and use for re-*

*ligious purposes.'* But to prevent or lessen the abuses which experience has demonstrated will likely follow the traffic in whiskey, in any form, the state may place watches over it; may enact all sorts of police regulations; may require licenses, and establish strict official inspection and police surveillance. The efficiency of the license system, as fairly attaining the supervision aimed at, is attested by common experience. The officers of the law, by a mere inspection of the records, may at once know where the business is followed as to which their supervision and oversight are needed."

Tiedeman in his text on the control of Persons and Property, says in Section 85, at page 239:

"The profession of medicine is a proper and necessary calling, and if pursued only by men, possessed of skill, instead of threatening public evils is of the highest value to a community. *The only evil, involved in the prosecution of that calling, is that which arises from the admission of incompetent men into the profession. Police regulation of the practice of medicine must, therefore, be confined to the evil, and any prohibition or other restrictive regulation which went beyond the exclusion of ignorant or dishonest men, would be unconstitutional.*"

### POINT V.

**Regulations drawn by an executive department under a delegated power, which are in derogation of the statute which they are intended to enforce, are illegal, just as a statute which is in derogation of the Constitution is invalid.**

Those portions of the Regulations which have been promulgated by the Treasury Department purporting to enforce the Volstead Act with regard to the regulation of the traffic in spirituous liquors which go beyond the scope of the Act itself in the matter of enforcement and penalties, are unconstitutional and invalid. Regulations which seek to enforce an Act of Congress and which are prepared by one of the Executive Departments of the Government under a delegated power, must be within the limits and in furtherance of the enabling Act and must not in their effect subvert or be in derogation of the Act.

This is the rule applied in *Williamson v. United States*, 207 U. S., 425, where certain regulations of the Land Office with reference to the statute providing for the sale of timber and stone lands were challenged as being drastic far beyond the authorization of the Act of Congress. In the opinion of the Court, per Mr. Justice White, it was held (p. 462) :

"This power must in the nature of things be construed as authorizing the Commissioner of the General Land Office to adopt rules and regulations for the enforcement of the statute, and cannot be held to have authorized him, by such an exercise of power, to virtually adopt rules and regulations destructive of rights which Congress had conferred."

See, also,

*Morrill v. Jones*, 106 U. S., 466, at 467;  
*St. Louis Independent Packers Co. v.*  
*Houston*, 215 Fed., 553, 559;  
*United States v. 11,150 Pounds of Butter*,  
195 Fed., 657;  
*Leecy v. United States*, 190 Fed., 289, 292.

In promulgating the regulations purporting to enforce the Volstead Act, the Treasury Department provided, with respect to the prescription of liquors by physicians, Sec. 77 (a):

“No prescription may be issued for a greater quantity of intoxicating liquor than is necessary for use as a medicine by the person for whom prescribed, and in no case *may spirituous liquor in excess of one pint within any period of ten days be prescribed for the same person by one or more physicians.*”

It is nothing short of an indefensible arrogance for the Treasury Department to assume a power *not* granted by the Volstead Act and to regulate as to what two physicians may do under the act for one patient. That is not within the province of the Treasury Department under the authorities cited, and is an usurpation of the grant of regulatory power not expressly delegated and is consequently invalid.

The decision of the Supreme Court of the United States in *Waite v. Macy*, 246 U. S., 606, is significant in this connection. The Court there held, to quote the headnote:

“A transgression of its statutory power by an administrative board is subject to judicial restraint although guised as a discretionary decision within its jurisdiction.”

## POINT VI.

**The allegation in defendant's answer that "large numbers of reputable and responsible physicians throughout the United States" do not believe that the use of spirituous liquors is ever necessary in medical treatment, is beside the point. Constitutional rights are not to be thus determined.**

**Nevertheless, the majority opinion of medical practitioners in the United States and renowned clinicians the world over pronounce the use of alcohol an absolute necessity in the treatment of disease.**

The assertion contained in Paragraphs Fourth and Fifth of the answer, that large numbers of eminent physicians deny that alcoholic liquors have any value as a medicine and believe that it is never a necessary medicine, is not determinative of any issue, and tends to weaken rather than to sustain any opposition to Dr. Lambert's position in this case. It is not for defendants' counsel to find sanction for this gross usurpation of medical judgment on the part of the Congress, by resolving what may be a debatable question in favor of one group of physicians and against another. The Eighteenth Amendment did not establish the Congress as an arbiter of medical controversy.

Nevertheless lest there be any doubt in the mind of the Court that the question as to whether or not, in the minds of a majority of physicians, alcohol is a necessary and valuable therapeutic agent, it becomes appropriate that counsel point out the overwhelming authority which sustains and clarifies the position of Dr. Lambert. In an Appendix to his brief, therefore, the attention of the Court

is directed to the medical authorities. The Appendix contains a summary of medical text books and sets forth the results of the physician's referendum on the medical value of spirituous liquors, and a collation of opinions of eminent clinicians upon this question.

The illuminating article by the late Doctor Jacobi is especially referred to as showing how the Volstead Act affects the physician in matters of life and death.

Moreover, the Referendum furnishes conclusive evidence that the majority opinion of the medical profession in the United States is in accord with Dr. Lambert, that the free use of alcohol is necessary in the treatment of certain diseases.

In 1921, on behalf of the American Medical Association, a Referendum was conducted as to the subject of the therapeutic value of alcohol. A questionnaire was sent out to more than one-third of the physicians of the country, in which each physician was requested to state as to whether or not he deemed alcohol a *necessary* therapeutic agent. The word "*necessary*" was deliberately employed rather than the less definite term "*desirable*" or "*advisable*" in order that the results might be determinative of the question and not leave room for quibble. Fifty-eight per cent. of the physicians returned their questionnaires to the Association, and of these 51% attested to the therapeutic necessity of whiskey. As stated, a full extract from the journal of the American Medical Association as to the final report on the subject appears in the Appendix.

In addition, the attention of the Court is respectfully called to the unquestionable evidence contained in textbooks on treatment and practice, written by eminent physicians for use by medical students and medical practitioners. The endorsement of alcohol as a curative medicine, even among those clinicians who recommend its cautious use, seems to be well-nigh universal.

An unprejudiced perusal of this Appendix must fortify the conviction that the Congress has dangerously overstepped the bounds of police power, in imposing its medical judgment upon the physician, and in depriving the patient of his right to the medicine and quantities of medicine which his medical adviser deems *necessary* to preserve and sustain him, whether administered through the mouth or the rectum.

#### **POINT VII.**

**As a substitute for the unconstitutional prohibitions of the Volstead Act in the giving of prescriptions and the invalidity of the regulations, there can be appropriate, salutary and comprehensive legislation and regulations, not as to the prohibition, but as to the conditions of issuing such prescriptions.**

These, however, must take the form not of prohibition but of regulations and must be directed not against the practice of medicine by Dr. Lambert, but against the subterfuges of the unworthy practitioner for violation of the Act. In so far as such regulations have this purpose in view, Dr. Lambert and all like physicians would be required to conform to them. Required is scarcely the ap-

proper word, so much would they welcome such restrictions.

There are many effective forms which such regulations might take.

The provisions under the so-called Harrison Drug Act suggest one. The Harrison Drug Act makes it a crime to give drugs to addicts, but does not unconstitutionally seek to limit the amount of drugs which a physician may give to the ordinary patient. It provides that prescriptions be kept for two years, subject to visitation by governmental authorities, so that it may be known whether the Drug Act has been violated.

The Association for the Protection of Constitutional Rights has suggested another regulation still more restrictive and drastic:

"Further Resolved, that the members of this Association, however, favor and will advocate the enactment of such Regulations as will require physicians prescribing alcoholic liquor in such amounts as they deem proper, to file any and all prescriptions with properly designated Governmental authorities, in order that any abuse by unworthy practitioners of the right to administer alcoholic liquor may be prevented and the offenders adequately and summarily punished."

Under such a Regulation the unworthy practitioner would, so to speak, *write a count in his own indictment*. In association with this required filing of the prescription, the Government might well establish the Dispensing Depot, wherein could be obtained—what notoriously is often not now obtainable—proper medicinal liquor for internal and external use.

Again, this might be provided by Regulation: The punishment for the first offense under the Volstead Act—and in the eye of the Law the second offense is not committed until after a conviction for the first offense—is now but \$500 to the bootlegging doctor. That punishment can, with much propriety and effectiveness, be markedly increased. It can be made a misdemeanor only by imprisonment. There are precedents for such punishments, notably in the anti-gambling statutes of the State of New York.

Then, further, the bootlegging doctor can be reached effectively in other ways. Every physician whose impounded prescriptions for alcoholic liquors justify suspicion and investigation might be compelled to file an affidavit with the governmental authorities to the effect that he has prescribed liquor only for medicinal purposes. And at regular intervals he can be required to file an affidavit stating that, during the period between the filing of such affidavit and that of the preceding one, he has not prescribed any liquor for other than medicinal purposes. The affidavit, if false, could be made to subject the offender, not to a fine of \$500, but to the punishment for perjury—to the loss of his liberty and of his citizenship.

There are many other restrictions which Dr. Lambert and his associates believe can be resorted to for the elimination of the bootlegging doctor. There are no pains and penalties too rigorous or unrelenting for the violators of the spirit and letter of the Amendment.

All such provisions, however, must, as has been pointed out, be directed against the use of alco-

holic liquors for beverage purposes, and not for medicinal purposes. They must in nowise trespass upon the right of the physician to heal and even save the sick according to his untrammeled judgment, merely because there are members of that profession who, unless restrained, would prostitute their high calling for the accompanying criminal and abhorrent profit of trafficking in intoxicating liquors for beverage purposes.

The malefactor can be appropriately and adequately dealt with by constitutional methods; the Amendment confers no authority upon Congress to adopt any other method.

As has been stated, the provisions of the Volstead Act under Sections 6 and 10, in reference to wines for sacramental uses, furnish illustration of the sole constitutional method of legislation by Congress as to liquors for medicinal purposes.

These, it will be seen, are in nowise prohibitions, but merely regulations—designed to detect and apprehend and punish the violator who criminally diverts such wines to beverage purposes.

In this direction Congress and the Executive Department may go to the reasonable length, dictated by wise judgment, as to liquors for medicinal purposes. They may proceed in no other direction and deal with prohibition instead of regulations. *They have conformed to the constitutional method in one case and wholly departed from it in the other.*

**POINT VIII.**

**Defendants' motion to dismiss should be denied and the complainant should be given the relief prayed for in the complaint.**

Respectfully submitted,

DAVIES, AUERBACH & CORNELL,  
Attorneys for Complainant.

JOSEPH S. AUERBACH,  
MARTIN A. SCHENCK,  
Of Counsel.

## **APPENDIX OF MEDICAL DATA.**

**The Explanation and Results of the Referendum of Physicians on Behalf of the American Medical Association as to the Necessity of Alcohol for Treatment of Diseases.**

**The Referendum on Alcohol, Reprinted from the Journal of the American Medical Association.**

In hearings before Congress, in the discussion of regulations issued by the Internal Revenue Department, in fact, in practically every discussion of prohibition, contradictory statements have been made as to the views of physicians on the value of alcoholic beverages as therapeutic agents. Several scientific organizations have adopted resolutions on the subject. So far as we know, however, no attempt has heretofore been made to ascertain, in a direct way, the opinions of any considerable number of physicians.

In order to secure the views of a representative portion of the medical profession, a questionnaire was sent to more than one-third—53,900—of the physicians of the United States.

The excellent response, reaching 58 per cent. of replies and representing 21.5 per cent. of the physicians of the country, a percentage of return seldom attained by the questionnaire method, has been gratifying as an indication of the interest taken by our profession in this attempt to secure an adequate expression of its views.

Some have taken exception to the word "necessary," claiming that no drugs are absolutely necessary, and that "desirable" or "advisable" would have been a better word for the purpose. This

point was given careful consideration in formulating the question. Moreover, the word "necessary" is used in the National Prohibition Act itself (Section 7, Title II):

\* \* \* And no physician shall prescribe liquor unless after careful physical examination of the person for whose use such prescription is sought, or if such examination is found impracticable, then upon the best information obtainable, he in good faith believes that the use of such liquor as a medicine by such person is *necessary* [italics ours] and will afford relief to him for some known ailment.

The word "advisable" or "desirable" would have been as much too mild as "necessary" is, perhaps, too strong; "necessary" does not mean indispensable, and it was properly regarded by practically all who answered the questionnaire.

The criticism has been made that the question as to whether whiskey is a necessary therapeutic agent is a scientific one and cannot be decided by resolution or by votes. This is true; and the referendum was to secure the *opinions* of physicians on the subject, not to decide a scientific question. It is granted that the physiologic effects of alcohol are matters which may be determined in the laboratory; but therapeutics is the application of such findings to the treatment of disease as determined by the opinions of physicians. This and the experience of physicians—for the opinions necessarily are based on experience and observation—may be determined, as has been done, by the questionnaire.

The questionnaire has brought out definitely the fact that the present regulations governing the medicinal use of alcoholic beverages are not satis-

factory—in fact, many physicians declared them “intolerable.” Many who were convinced that these drugs were not necessary therapeutically were emphatic in stating that other physicians who believed them necessary were entitled to have their views respected, and were warranted in efforts to have the drugs made available without incurring the odium attaching under the present regulation.

### The Questionnaire.

“Q. Do you regard whiskey as a necessary therapeutic agent in the practice of medicine?  
A. The total vote in all states on whether or not whiskey was *necessary* in the treatment of disease was 30,843; 15,625, or 51 per cent., answered yes, and 15,218, or 49 per cent., answered no.”

### Authorities Recommending the Use of Alcohol as a Curative Agent.

The late Dr. Abraham Jacobi was widely known and widely revered in his profession and among laymen. In an article on Alcohol Medication, published in American Medicine, New Series, Volume VIII, No. 9, pp. 575-577, written as recently as September, 1913, Dr. Jacobi says:

“An editorial in the July number of AMERICAN MEDICINE (p. 459) refers to the latest views on alcohol as expounded by Ewald. It states that ‘all theories to the effect that it is to be classed as a stimulant are about exploded.’ It is also asserted that ‘those who are always waiting for some medical oracle to speak can now come over without fear to the modern consideration of alcohol as a sedative or anesthetic. The writer begs leave to say that

the 'explosion' has not reached his ears. But then, he is quite willing to admit he is not an oracle, surely less so than Ewald who never claimed to be one. If he ever had done so, he would have forfeited his rights, when, as the editorial says, he maintained that alcohol would no longer be used in illness. That time must never come, and as far as I can see, should not come, *for there are conditions which absolutely demand the use of alcohol as a prominent part of medication.*

\* \* \* \* \*

"I do not care to class alcohol anywhere. It has been called, or eulogized as a stimulant, a sedative, an anesthetic, an inhibitory and depressant power, aye as a paralyzer. I do not contest observations and experiments either on healthy or diseased men, and on animals. Indeed, I have great respect for experiments and observations in and out of our laboratories, and at your northern exposure windows. One of the most profitable laboratories, however, is the hospital and the private bedside. They have the advantage over an experiment on a dog or a rabbit, for while the experimenter on the latter is not infrequently devoid of clinical observation, when he publishes his result, the clinician seldom, if ever, appeals to the attention of his peers before he has confirmed his observations by scores or hundreds of cases. Great clinicians are more circumspect than loud. Hippocrates, the great, says more frequently than any of his successors, 'it seems to me.'

"Having been in uninterrupted contact with diphtheria since 1853 when it began its renewed murderous attack on our part of the world, I have anxiously looked for means to mitigate or heal what too often manifests itself as absolutely fatal. The virulent epidemics of forty years ago have furnished the

formidable examples of sepsis and gangrene which in part were mitigated by my introduction of nasal irrigations, and sometimes restored to final health by local doses of alcoholic beverages. I shall return to that.

\* \* \* \* \*

"When in 1860 I began to tracheotomize in diphtheritic laryngitis, I had three recoveries among my first five cases. They were published. Then—lo and behold, in the early seventies I had more than one hundred operations without a single recovery. So I learned wisdom and caution. This is why *after sixty years of practice when I trust in alcohol as a powerful remedy in cases of diphtheritic and other sepsis, I may be credited with ample experience both in successes and failures extending over half a century.* What I offer is no theory, and no laboratory experiments on the well or sick guinea pigs. My laboratory has been different. My life has been spent amongst the sick only, and the recovering and dying."

"A few stray specimens of my observation are as follows: With one of my most respected colleagues I saw thirty-five years ago a boy of five years. Membranes covered his fauces and mouth and part of the lips, and were visible in the nares. Round the neck were big lymph-body swellings, now known to all of us as the sure proof of thorough mixed infection. Some membranes could be removed by forcible injections into the nose. It had been bleeding and oozing; the odor was foul. The second heart sound still slightly perceptible, pulse 160, hardly felt at the wrist. Boy restless in his semi-coma, tossing about, feet bluish, not cold, covered with erosions and subcutaneous hemorrhages of different sizes. His whole surface discolored, from drab to blue; hemorrhages small and large in and un-

der the skin. No intestinal hemorrhage. Urine could not be obtained. My friend told me I was not called by him but by the family of the dying boy; he was going down town and on his way would order the undertaker to send the coffin after dark. I begged him not to do that, but to wait until to-morrow. The undertaker, however, came after dark and left disgusted. Meanwhile I had permission to act. The boy's stomach retained my whiskey, from one to two teaspoonfuls every 15 or 25 minutes, diluted in water, occasionally in milk or coffee, and his rectum retained a few doses. Within a day he took a pint and a half, perhaps more. We kept on, the boy and I. He was alive when I happened to meet him twenty years afterwards.

"A girl of seven years I found in about the same condition thirty years ago. She was a patient of one of our great physicians who, when he died suddenly a year ago, proved to the world that there are some men who are indispensable. He said, 'Now, here, I have given your whiskey but she will die.' How much is she taking? 'Besides her other drugs she is taking as much as half a pint each of these two days, and retains it.' Very well, just continue, and I will give her my additional half pint. So we did, she took a pint or more daily. And got well.

"A boy of three years with the formidable symptoms of mixed infection was 'given up.' I held out the hope of recovery provided the doctor would succeed in getting into him with other appropriate medication, at least a pint of whiskey daily. He did succeed. Five days afterwards the father called in despair, saying his child was alive but insane. So he was, the boy was better; in fact, on the way to recovery, but drunk. To me that was a welcome occurrence, for I knew, and want my reader to know, that *no amount of whiskey will lead to*

*intoxication when its effect is wanted to combat sepsis.* I repeat: No amount of alcohol will intoxicate a thoroughly septic person. As soon as my little patient did no longer require his big dose of alcohol, it made him 'insane,' intoxicated."

### Standard American Text Books on the Practice of Medicine.

Austin Flint, M. D., L. L. D., says in the *Treatise on the Principles and Practice of Medicine*, page 983, with regard to the treatment of typhoid and typhus fevers:

"Alcoholics have entered largely into the treatment of fevers in this country during the last thirty years. That they have been used too freely and indiscriminately can hardly be doubted. As a natural consequence, there is perhaps at the present moment a tendency to undervalue their importance. \* \* \* Observation of their immediate offices in certain cases shows their utility—often in a very striking manner. \* \* \* Used with proper application and moderation, they form an essential part of the supporting treatment of fevers as well as of all other diseases which destroy the life by asthenia."

James M. Anders says, in *A Text Book of the Practice of Medicine* (14th Ed., with assistance of John H. Musser, Jr.), page 50:

"Alcohol is less commonly employed at present than formerly, it is of some value in combating unfavorable nervous symptoms due to the typhoid septicaemia. The quantity to be administered must be regulated by its effects, since it may act injuriously and even aggravate the symptoms though this is seldom the case. \* \* \* Threatened collapse may

be met by full doses of alcohol ( $\frac{1}{2}$  oz. every hour). \* \* \* Effective doses of diffusible stimulants, as champagne, are useful during periods of sudden circulatory depression."

Page 117.—Is against using alcohol in lobar pneumonia.

Page 138.—Recommends use of alcohol in influenza.

Page 167. Recommends alcohol in septicaemia and pyaemia.

Page 209.—Recommends alcohol in scarlet fever.

James Tyson says, in *The Practice of Medicine* (6th Ed., with M. Howard Fussel), page 28:

"Alcohol is not a heart stimulant as formerly supposed. That a certain amount may be utilized as food is certain. That alcoholics afflicted with typhoid fever need some form of alcohol seems certain, therefore alcohol is used in good doses 30 to 60 cc. every two or three hours in alcoholics in the early stages, but is gradually reduced in amount. \* \* \*

"When the heart muscle begins to flag, the pulse becomes rapid, and the patient extremely weak, doses of 15 to 30 cc. ( $\frac{1}{2}$ -1 oz.) may be given every two or three hours with good effect. \* \* \* A low muttering delirium, feeble dicrotic pulse, and dry tongue are among the indications which imperatively demand small amounts of alcohol."

Page 40.—Typhus fever. Alcohol should be given as in typhoid.

Page 267.—Recommends alcohol in lobar pneumonia, in form of whiskey or brandy.

A. A. Stevens, M. A., M. D., Professor of Applied Therapeutics in the University of Pennsylvania,

says in *The Practice of Medicine*, page 125, with regard to the treatment of diphtheria:

"Notwithstanding the fact that much has been written against the use of alcohol many clinicians of long experience believe that this drug is decidedly useful when asthenia is pronounced. For a child of three or four years a dram may be given every three or four hours."

#### Standard American Text Books on Therapeutics.

Hobart Amory Hare says, in a *Text Book of Practical Therapeutics*, page 78:

"Notwithstanding the almost universal use of alcohol as a stimulant by the laity and the medical profession, it cannot be denied that evidence of scientific character and weight is constantly being brought forward which shows that its dominant action is depressant upon all parts of the body. \* \* \* Nevertheless *clinical experience, too great to be ignored, stands for the continued employment of the drug.* The drug does not act as a stimulant in the ordinary sense of the term, but nevertheless readjusts the circulation by dilating the peripheral vessels and influences the protective powers of the body by affecting the blood cells or the blood stream or the lymph."

Oliver T. Osborne, in *The Principles of Therapeutics*, page 242, says:

"The internal therapeutic use of alcohol should be entirely separated from a consideration of alcohol as a beverage or from the prohibition standpoint. Alcohol is a drug, and as such has many valuable uses. \* \* \* There are times, for individuals who are weak, and in old age, when a little bitter tonic which contains alcohol, taken before meals, is perfectly legitimate treatment. In the age when alcohol could be obtained, it was a per-

fectly harmless proposition, in old age, with sleeplessness, to order a small amount of alcohol in the form best suited to the individual, to be taken before bed time. It is in such cases much less likely to do harm than is a stronger hypnotic drug."

Reynold Webb Wilcox says, in *Materia Medica and Therapeutics*, page 742:

*"Alcohol is of immense advantage in many instances of febrile disease. \* \* \* It is by no means adapted for all varieties of fever, and hence its effects should always be carefully watched. \* \* \* While it is often given when quite unnecessary, there are many instances in which it is of inestimable value in such affections as typhoid and typhus fevers, pneumonia, smallpox, cholera, and diphtheria and also in gangrene, pyaemia, septicaemia, etc."*

#### Foreign Authorities.

##### British.

In the INDEX OF TREATMENT BY VARIOUS WRITERS, edited by Robert Hutchinson, M. D., and James Sherren, C. B. E., revised to conform with American usage by Warren Coleman, M. D., Assistant Professor of Medicine, University and Bellevue Hospital Medical College, Visiting Physician to Bellevue Hospital, New York, 1921:

LEWIS SMITH, M.D., F.R.C.P., Physician London Hospital—

Recommends iced champagne in small quantities in the treatment of Addison's disease.

**GRAHAM STEELL, M.D., F.R.C.P., Emeritus Professor Victoria University of Manchester, Consulting Physician Royal Infirmary, Manchester—**

Recommends alcohol in the form of brandy in the treatment of angina pectoris.

**W. J. HADLEY, M.D., F.R.C.P., F.R.C.S., Physician, Pathologist and Lecturer in Medicine, London Hospital, Physician City of London Hospital for Diseases of the Chest—**

Recommends judicious administration alcohol in cases of bronchial asthma. Believes that alcoholic stimulants are sometimes needed in the treatment of catarrhal bronchopneumonia.

**C. W. DANIELS, M.B., Camb., M.R.C.S., F.R.C.P., Lecturer Tropical Diseases London Hospital and London School of Medicine for Women. Physician, Albert Bock Hospital—**

States that in the treatment of black water fever alcoholic stimulants are required after the second day.

**CECIL WALL, M.A., M.B., Oxon., F.R.C.P., Physician London Hospital and Hospital for Consumption, Brompton, Consulting Physician Poplar Hospital—**

Recommends stimulants in small quantities in the treatment of acute bronchitis and in the treatment of chronic bronchitis suggests increasing doses of the best brand of whisky obtainable.

**E. W. GOODALL, O.B.E., M.D., B.S., Medical Supt.  
Northwestern Hospital, Hampstead—**

Recommends strychnine, brandy and similar stimulants in cases of cardiac failure in diphtheria. Recommends brandy up to 4 oz. in 24 hours, and in desperate cases 3 to 4 oz. of good champagne every 2 or 3 hours in case of acute infectious diseases.

**W. H. CLAYTON-GREENE, C.B.E., M.B., B.C., Camb., F.R.C.S. Honorary Consulting Surgeon Richmond Royal Hospital, Lecturer of Surgery St. Mary's Hospital Medical School, Surgeon St. Mary's Hospital, King Edward VII Hospital and King George Hospital—**

States that alcohol may be required in the treatment of erysipelas.

**ARTHUR P. LUFT, C.B.E., M.D., B.S.C., F.R.C.P., Consulting Physician St. Mary's Hospital—**

Admits that alcohol may even be necessary or desirable in the treatment of gout, a disease in which alcohol must be avoided if possible.

**BYROM BRAMWELL, M.D., F.R.C.P.E., L.L.D., F.R.S.E., Consulting Physician Edinburgh Royal Infirmary—**

Recommends alcohol as a stimulant in relieving urgent symptoms of cases of valvular heart disease.

**E. W. GOODALL, O.B.E., M.D., B.S., Medical Supt.  
Northwestern Hospital, Hampstead—**

States that in the treatment of measles when complicated with severe diarrhoea, stimulant is required in the form of brandy. For the same disease he prescribes two grains sul-

phate of quinine every 4 hrs. with an alcoholic stimulant in the form of brandy or Champagne. Prescribes for the treatment of scarlet fever hypodermic injections of strychnine and brandy and Champagne by the mouth.

**GRAHAM STEELL, M.D., F.R.C.P., Emeritus Professor Victoria University of Manchester, Consulting Physician Royal Infirmary, Manchester—**

Says of the treatment in cases of myocardial failure "alcohol, no doubt, acts largely like a nitrite dilating the arterioles and so relieving the heart."

**W. J. HADLEY, M.D., F.R.C.P., F.R.C.S., Physician, Pathologist and Lecturer in Medicine London Hospital, Physician City of London Hospital for Diseases of the Chest—**

States with regard to the treatment of pneumonia that he personally prefers strychnine and digitalis for cardiac stimulation before resorting to alcohol, but recognizes its necessity in some cases. He also commends the use of alcohol in pneumonia as a soporific to induce rest and sleep.

**SIR ROBERT W. PHILIP, M.A., M.D., F.R.C.P.E., F.R.S.E., Senior Physician Royal Infirmary and Royal Victoria Hospital for Consumption, Edinburgh—**

States that alcohol may be administered as

States that alcohol may be administered as a stimulant in the treatment of pulmonary tuberculosis according to the individual need. Whiskey, wine, beer or stout in various amounts may be given to the patient. He says further that "the administration of alcohol offers distinct advantages in the pyrexia of ad-

vanced disease . . . as to form, pure spirits (whiskey, brandy) is usually wisest diluted in milk or mixed with eggs and milk as egg flip or in alkaline water."

**F. J. POYNTON, M.D., F.R.C.P.**, Physician University College Hospital, Physician Hospital for Sick Children, Great Ormond Street—

Recommends alcoholic stimulant in cases of acute rheumatism. He says "brandy and dry Champagne are the most useful stimulants."

**GILBERT A. BANNATYNE, O.B.E., M.D., F.R.C.P.**, Consulting Physician Royal Mineral Water Hospital and Royal United Hospital, Bath—

Says of the treatment of rheumatoid arthritis "stimulants are often of service, especially sound wine; but each case must be considered separately and should the stimulant increase pains it must be discontinued." In the diet list he includes "alcoholic drinks as prescribed (whiskey, wines and malt liquors)."

**ROBERT HUTCHISON, M.D., F.R.C.P.**, Physician London Hospital and Physician Hospital for Sick Children, Great Ormond Street—

Says of the treatment of scurvy that "cider and the French and Italian wines are also curative drinks." And in seasickness "iced champagne may be given freely."

**W. H. CLAYTON-GREENE, C.B.E., M. B., B. C. Camb., F.R.C.S.**, Honorary Consulting Surgeon Richmond Royal Hospital, Lecturer of Surgery St. Mary's Hospital Medical School, Surgeon St. Mary's Hospital, King Edward VII Hospital and King George Hospital—

States in case of septicaemia and pyaemia that "alcohol is of undoubted value, and may be used freely."

C. W. DANIELS, M.D., Camb., M.R.C.S., F.R.C.P.,  
Lecturer Tropical Diseases London Hospital  
and London School of Medicine for Women,  
Physician Albert Bock Hospital—

In treating yellow fever says “alcoholic stimulants should not be resorted to at the commencement, but are usually required on or after the third day.”

Arthur Latham, M. D., F. R. C. P., Physician and Lecturer on Medicine at St. George's Hospital, London, in the *Oxford Index*, says of the treatment of pneumonia, page 719:

“Stimulants should not be given as a routine measure but in accordance with the condition and previous habits of the patient. As soon as the pulse becomes at all unsatisfactory alcohol should be given in the form of old brandy or champagne. At first two to five ounces of brandy in the twenty-four hours is sufficient, but the quantity may have to be pushed to ten ounces.”

#### French.

G. LYON, *Traité Elementaire de Clinique Thérapeutique*, 1920, page 1369—

*Infectious diseases:* With respect to alcohol, in all its forms, certain groups of cases must be distinguished. *Alcohol is useful in all typhoid conditions*, and should be administered especially in the form of old Bordeaux or Burgundy wines of which as much as a bottle daily may be given; dry champagne, well diluted with water (a quarter of a bottle), old whiskey or rum which serve to prepare “groggs”; “Kirsch,” or cherry brandy, which is usually given in milk. Alcohol itself should be given only in relatively weak doses (50-60

G. daily). In mild or moderately severe cases of typhoid fever, the above-mentioned doses of alcohol represent the maximum allowance.

*Alcohol in Pneumonia:* An immense therapeutic advance was made by the institution of alcohol-medication, by Todd, first limited to the treatment of pneumonia and then extended to that of all other infectious diseases. In restricting the indications of alcohol, Todd gave it only in the pneumonias of alcoholic patients and in adynamic or infectious pneumonias. Loss of strength being the rule in aged and cachectic patients, alcohol is here invariably indicated, as well as in secondary pneumonias and ataxo-adynamic or typhoid pneumonias, with or without hyperthermia.

A. RICHARD. *Précis de Therapeutique et de Pharmacologie*, 1910, page 642—

"Since some years, a frequently equally exaggerated reaction seems to have set in against the old opinion, and alcoholic medication is now entirely rejected by some extremists. The majority of clinicians, however, still admit that alcohol, administered in moderate doses and temporarily, may be very useful in a certain number of febrile diseases, both as an accessory and easily oxydized food, and against the adynamic symptoms."

A. MARTINET, *Therapeutique Clinique*, 1921, Tome II, page 1137—

"According to recent findings, alcohol is an even better food for diabetic patients than suggested by older investigations. It diminishes to a considerable extent the formation of acetones, improves the assimilation of sugar, and favors still more than the fats, the metabolism of nitrogenous foods. It is therefore rational to replace in cases of severe dia-

betes a portion of the fats in the diet by alcohol."

M. MINELLE, *L'Alcohol en Therapeutique Infantile Maladies Aigües Febriles, These de Paris*, 1903. Speaking only of sick children, Minelle says—

Alcohol medication should be reserved for the treatment of general prostration and collapse, in the course of acute febrile diseases of children. Under the conditions, alcohol through an active stimulation of the central nervous system seems to exert a tonic effect upon the cardiovascular apparatus, with a strengthening action. The alcohol should always be given diluted and in small doses, stopping its use after the therapeutic effect has been accomplished.

#### German.

H. CURSCHMANN, *Der Unterleibs-Typhus*, Monograph, Vienna, 1898, page 428—

*"In spite of all theoretical objections, alcoholic agents are indispensable for the practitioner in the treatment of typhoid fever as well as in the treatment of acute febrile diseases in general. Personally, I would not care to treat typhoid fever patients at certain stages and in certain conditions, without the assistance of alcohol."* The old prejudice against a fever-increasing effect of alcoholics has been definitely removed by the findings of Ziems-sen, Jurgensen, and Liebermeister. Although a theoretical explanation meets with difficulties, the stimulating effect of alcoholic agents upon the circulation and respiration has been positively established and from the practical viewpoint.

F. PENZOLDT, *Lehrbuch der Klinischen Arzneibehandlung*, 1921, page 127—

"Ethyl alcohol in the form of alcoholic beverages, under individualistic employment, constitutes an inestimably valuable remedy in the treatment of numerous, especially febrile diseases, more particularly in cases of heart failure. Alcohol was extensively used in former centuries, and is at present considered by the majority of physicians as an important adjuvant in the treatment of many diseases. Recently, voices have been raised to discredit this remedy, and based upon their laudable zeal to prevent the abuse of alcoholic beverages in general and to restrict an exaggerated therapeutic use of alcohol, some writers have gone so far as to question various curative properties, hitherto attributed to alcohol. The opposition is based too much on the partly incomplete and contradictory results of experimental investigation. Unprejudiced estimation of experiences at the bedside arrives at very different results. In the first place, it is very noteworthy that under appropriate employment—(a necessary condition for the use of any remedy)—*alcohol has never been known to cause visible damage*. Positive benefit, as shown by experience, is produced by alcohol. \* \* \* According to Penzoldt's experience, the most extensive possible use of alcohol should be made, *unconditionally*, in grave cases of diphtheria, and septic infection, more particularly puerperal sepsis."

C. A. EWALD, *Der Alkohol Bei Infektions-Krankheiten*, Mediz. Klinik, 1913, IX, page 1233—

Although Ewald is opposed to the use of alcohol in infectious diseases and also in pulmonary tuberculosis, he points out that the

stimulating action of alcohol on the heart may apparently be utilized to advantage in grave cardiac collapse, of toxic as well as of mechanical character, due to hemorrhage.

M. GRUBER, *Der Einfluss des Alkohols auf den Verlauf der Infektionskrankheiten*, Wiener Klin. Wehschrift. 1901, XIV, page 479—

According to the judgment of experienced clinicians and careful observers, alcohol seems to have an excellent effect in certain diseased conditions, where it may be practically indispensable. Besides being indispensable in dyspepsia and in diabetes, alcohol is also considered as an indispensable analeptic agent in the treatment of collapse. *Professional experience has shown that large doses of alcohol may have a positively life-saving effect in cases of acute collapse.*

#### **Alcohol in Nutrient Enemata.**

FORCHHEIMER, F.—*The Prophylaxis and Treatment of Internal Diseases*. D. Appleton & Company, 1906.

#### **Alcohol in Heart Diseases. Page 384.**

*Alcohol* is a valuable remedy in heart affections; this is proved more by the results of actual experience than by those of experiment. In small doses it acts as a stimulant producing dilatation of the blood vessels; whether it directly affects the heart beneficially has not been conclusively decided, although it is more than likely that it does so. It is of service in those conditions of the heart that are due to infections; it may be used to counteract the vasoconstrictor effects of digitalis. In the so-called senile heart, indeed in

any of the cardiac affections of old people, it is practically indispensable.

**Treatment of Ulcer of the Stomach. Page 277.**

The best nutrient enema is the one first recommended by Leube, a mixture of scraped meat and chopped raw pancreas, with which occasionally a patient may be kept in good condition for a long time. Between the other methods there is very little choice; my preference is for peptonized milk, with or without eggs, to which I add 30 gm. or one ounce of brandy when a stimulating effect is required.

**Alcohol a Specific Antidote in Acute Poisoning by Carbolic Acid. Page 588.**

In the place of the sulphates alcohol may be used, either in the form of whiskey or as alcohol very slightly diluted. Two or four ounces may be given by mouth after the stomach has been emptied; *an additional amount may be injected into the bowel.* The alcohol may be repeated at intervals of one or two hours according to the demands of the case.

MATAS, R.—*Surgery of the Vascular System. I*  
*Surgery of the Pericardium and the Heart.*  
*Keen's Surgery, Volume V, 1909, p. 17.*

Post-operative treatment: Hypodermics of strychnine with digitalis or digarten, and small doses of morphine and atropin will do good, especially when combined with the cautious administration of black coffee, hot tea, champagne, and other forms of alcoholic stimulants of the kind that the patient is accustomed to. Treatment of hemorrhage. See page 197:

"These external measures are effectively assisted by hot stimulating solution injected

slowly into the rectum, strong black coffee being especially available and beneficial. The formula for post-operative shock, acute anemia, or exhaustion usually prescribed by myself is: Black coffee 8 ounces; panopepton 1 ounce; *brandy or whiskey* 1 ounce; tincture of digitalis 15 minims; laudanum 10 minims; to be administered slowly and repeated every two hours if the case still calls for it. *Champagne, whiskey, or brandy, which are as diffusible by rectum as by stomach, may be freely given by enema*, diluted with physiological salt solution or combined with other ingredients, when for any reason they cannot be taken by the normal route."

Further on, Dr. Matas says that when frequent stimulation is required to strengthen the flagging heart, *champagne, whiskey and brandy toddies*, and black coffee, may be given by mouth.

**EUTIS, ALLEN C., B. S., R. B., M. D., New Orleans.**  
 Assistant Demonstrator of Chemistry, Medical Department of Tulane University; Visiting Physician to Charity Hospital. New Orleans Med. and Surg. Jrl. 1904-1905, Vol. LVII, page 18—

"My own experience with nutrient enemata is confined to the post-operative treatment of twenty-three laparotomie performed by Dr. E. S. Lewis, assisted by Dr. T. T. Lemann and Dr. C. N. Chavigny, to whose service I was assigned at the time. All of these patients were nourished exclusively by nutrient enemata for from thirty-six to forty-eight hours, and in some cases for seventy-two hours. The enemata consisted of *brandy*  $\frac{1}{2}$  oz., Tr. Opii 5 minims, and peptonized milk, 4 oz. Occasionally the white of an egg was added. They were given every four hours and to each

alternate one were added eight ounces of normal salt solution. I was struck by the fact that with very few exceptions those patients complained very little of thirst and of hunger, and we resorted to very little stimulation."

"Another case in which I used the same enemata was one of my own, in which there was a carcinoma of the pylorus very far advanced. The patient was a female fifty-two years of age, who was unable to retain anything by the mouth, but whom I was able to keep alive for three months by this method of alimentation."

WOOD, HORATIO C.—*Therapeutics, The Principles and Practice*, Tenth Edition, page 35.

Half a pint to a pint of milk with two or three eggs may be employed at each injection. When stimulants are required, half an ounce to an ounce of *brandy* may be added to each injection. The alcohol should always be added just before administration.

During the earlier stages of phthisis or consumption, alcohol taken with codliver oil, or in small amounts with the food at meal times, conduces not so much to the comfort as to the well-being and recovery of the patient.

*Administration:* When a mild stimulant is wanted in the beginning of fevers, especially if milk punch seems too "heavy," wine whey may sometimes be used with advantage. It is made by pouring a *half-pint of sherry or madeira* into a pint of boiling milk, stirring thoroughly, and after coagulation has occurred, straining off the whey, which may or may not be sweetened, according to the taste of the patient. *Mulled wine* is often very grateful to patients as a change. It is made by beating an egg up thoroughly with three fluid ounces of *sherry* and adding a like quantity of water, which must be actually boiling

when poured in. *Champagne* is useful in patients with delicate stomachs, especially if nausea or vomiting actually exists, and also may be employed with advantage in sudden failure of the vital powers, especially in elderly persons. It must be very "dry," i. e., as free as possible from sugar. Milk punch is prepared by adding from a dessert spoonful to a fluid ounce of brandy, whiskey, or rum, according to the degree of stimulation required, and the taste of the patient, to three fluid ounces of milk with sugar and nutmeg to taste.

*Endocrinology and Metabolism.*

Edited by

Lewellyn F. Barker

Associate Editors

R. G. Hoskins—Herman O. Mosenthal

D. Appleton & Co. 1922

Chapter on Artificial Feeding by Herbert S. Carter, p. 812—Rectal Feeding. Sample Formula.

Dextrose	20-50 gm
Alcohol	20-50 gm (cc)
Pancreatized milk	1000 cc
Salt	5-9 gm

This may be given in a 250 cc dose every 4-6 hours, and if well tolerated aids materially in helping the patient to tide over an emergency. By omitting the milk the solution is useful:

1. Simple exhaustion.
2. In Septic conditions.

3. As an antidote to chloroform; in phosphorus poisoning; or anything that causes fatty degeneration of the liver, e. g., toxæmia of pregnancy and in diabetic acidosis and acetonaemia.
4. After abdominal operations, especially in undernourished or dessicated individuals.

*(Above represents 1 1-3 to 3 1-3 oz. of whiskey daily by rectum in 24 hours.)*

C. S. BACON:

In pernicious vomiting of pregnancy.

Glucose	50 gm
Alcohol	50 cc
(Salts, etc.)	
Distilled water to 1000cc	

From 300 to 500 cc of mixture three times a day.

Journal American Medical Association, June 8, 1918, p. 1750.

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

SAMUEL W. LAMBERT,  
Complainant,

*against*

EDWARD C. YELLOWLEY, as Acting  
Federal Prohibition Director,  
DAVID H. BLAIR, as Commis-  
sioner of Internal Revenue,  
and WILLIAM HAYWARD, as  
United States Attorney,  
Defendants.

**COMPLAINANT'S REPLY BRIEF.**

**POINT I.**

**The so-called beer cases referred to in the District Attorney's Main Brief are in no sense authorities against complainant.**

The Brief while urging as its Third Point that the case at bar "is on all fours with and is decided by the so-called beer cases," admits, nevertheless, on page 11, that in *Falstaff Corporation v. Allen*, 278 Fed., 643, upon which so much undue emphasis is laid, the medicinal value of beer was not even involved. The outstanding feature of all of these cases, however, is that the right of a physician to prescribe was in no way involved. The suits were all by brewers to protect an as-

serted right of manufacture, and fall within one of the five prohibited relationships specified in the Eighteenth Amendment. The brewers claimed no right to prescribe and in the Falstaff case claimed no medical value in the malt liquors. The particular provisions of the Volstead Act made the basis of the case at bar are not in any way involved in any of these cases. Even the arguments as distinguished from the issues in such cases were directed to the supplemental Prohibition Act on the subject of malt liquor. Surely it cannot be seriously contended that any dictum of the Court in the Falstaff case or in any of these cases can be controlling or even influential in the case at bar.

This case for the first time, so far as we have been able to ascertain, presents the question. There are no decisions against complainant's contention that the Volstead Act in prohibiting physicians from prescribing intoxicating liquor transcends the obvious limitations of the Eighteenth Amendment.

## **POINT II.**

**The State statutes cited in the District Attorney's Main Brief and Reply Brief emphasize the fact that "beverage purpose" as used in the Eighteenth Amendment excludes medicinal use.**

The complainant urges that "beverage purpose" as used in the Eighteenth Amendment is a clear term of limitation; that at the time the amendment was submitted to the states for ratification such term, in state statutes and decisions, had

*commonly been accepted as excluding medicinal use.* The conclusion should therefore be irresistible that when the Amendment was adopted this was the only construction attributable to the phrase by the different state legislatures.

Neither on oral argument nor in his Brief, has the District Attorney suggested any other construction or meaning, or any construction which would at the same time escape the plain intention of a restriction on congressional power.

The District Attorney, by implication if not by direct statement, rejects the rule of construction which is that while the test as to the constitutionality of a State statute is whether or not it is inhibited by the State Constitution, the test as to the constitutionality of an Act of Congress is whether or not authority for its enactment is to be found in the Federal Constitution. He seems not to realize that only the presence of the inhibition condemns the one while the mere absence of authority condemns the other.

And yet, until this rule of construction is declared obsolete by the Courts, it is respectfully submitted that the Volstead Act in the particulars complained of must be held to offend against the Constitution.

The Brief of the District Attorney refers to a number of state statutes on the subject of liquor. Some of these statutes were passed after the Eighteenth Amendment, and therefore can have no legitimate bearing upon the construction of its language, being merely the exercise by the state of "concurrent power" of state enforcement in the Amendment. So far, however, as these statutes have any bearing on the point we have presented, they furnish additional support to complainant's

argument. *Beverage purpose whenever used in such legislation is in contradistinction to medicinal use.*

In the Alabama statute, for instance, which is the first referred to in the Brief, the Act of 1919 in its definition of prohibited liquors and beverages included any liquor, drink or beverage made or used for *beverage purposes* containing any alcohol. It contained a prohibition of sale for medicinal purposes *except on the prescription of a regularly authorized practicing physician.*

The Act of Florida contained a provision that nothing in the act should be construed to make unlawful the manufacture and sale at wholesale or to transport or cause to be transported from within or without the state alcohol for medicinal, scientific or mechanical purposes, or wine for sacramental purposes.

The laws of Indiana are not accurately summarized at page 17 of the Government's brief. Section 13 therein provides that it shall be unlawful for any licensed physician to issue a prescription for intoxicating liquor *except in writing*, or in any case unless he has good reason to believe that the person for whom it is issued will use the same for medicinal or surgical purposes or as an antiseptic.

So also the Code of Iowa is inaccurately summarized by the Government. The section employs the term "intoxicating liquors" unreservedly, and under a decision of that state no malt liquor capable of use as a beverage can be sold without prescription by the druggist.

The Kansas statute also is inaccurately summarized. The Act prohibits the manufacture and sale

of intoxicating liquors *except* for medicinal, scientific and mechanical purposes, and regulates the manufacture and sale thereof for such excepted purposes. The statute and its amendments except from its operation medicinal use of intoxicating liquors.

The statutes of Maine referred to on the Government's brief provide that no person shall sell any intoxicating liquors of whatever origin "for tipping purposes or as a beverage."

In the statutes of New Hampshire, referred to at page 18, it is provided:

"Before a physician shall give to any person a prescription for intoxicating liquor, he, the physician, shall make a diagnosis of the disease of the person applying for the prescription, and shall exercise the same professional skill and care in giving a prescription for intoxicating liquor, as in giving a prescription for any poisonous or habit-forming drug, and shall give definite directions as to the amount and frequency of the dose."

The statute of South Dakota, referred to at page 18, allows, with regulations concerning prescriptions, including the standing of the physician, and so forth, the prescription of intoxicating liquors. The act is directed against intoxicating liquors capable of use as a beverage, but in due compliance with regulations the physician may prescribe freely.

The laws of Tennessee referred to on page 18, regulate the prescription of intoxicating liquors by physicians.

Several of the drastic State legislations—for instance, that of Utah—are not only obviously unconstitutional under the State decisions we have

cited in our Main Brief, but plainly have not been the models on which the Eighteenth Amendment has been patterned. In fact, it may be said that the Eighteenth Amendment has been fashioned after the *conservative* State legislation, whereas the Volstead Act has gone beyond its bounds and has been fashioned on the *drastic and radical* State legislation. In this conflict the Constitution must prevail.

Again the District Attorney on page 19 of his main brief asserts that in States such as Colorado, Michigan and Minnesota the amount of alcoholic liquor which may be prescribed was strictly limited before the passage of the Eighteenth Amendment. We have not been able to find any justification for such statement in the laws of Colorado, Michigan and Minnesota directly contradict it. In each of these States the Act specifically excludes from the prohibition the manufacture, sale or transportation of liquor for medicinal purposes. It then goes on to regulate medicinal prescriptions. It does not in any way limit the amount which may be prescribed by a physician to a patient in any period of time. In each instance the Act merely limits the amount which may be prescribed upon one prescription. In Minnesota it must not be more than one pint of liquor, and in Michigan it must not be more than eight ounces of liquor on any one prescription. *Nothing prevents, however, two or more of such prescriptions being given by a physician in the same morning or afternoon.*

In other words, the law constitutes a regulation of the manner in which liquor must be prescribed, but in no respect constitutes a prohibition on

amount. It is a perfectly proper regulation that in regard to any definite amount of liquor, whether eight ounces or one pint, there shall be the certification that such amount is needed. It is an entirely unwarranted and unconstitutional prohibition, however, which would in all cases and without exception prevent a physician in giving more than a rigidly fixed amount in a rigidly fixed period of time. This the Volstead Act attempts to do, and this, moreover, neither of the state statutes referred to in the Government's brief in any way purports to do.

Apparently it is the contention of the Government that if it can show that any State legislation, no matter what its phraseology, attempted to prohibit or curtail the right to prescribe intoxicating liquor as a medicine, the Eighteenth Amendment should be so construed.

On the contrary such a situation must lead to a directly opposite judicial conclusion.

Here were the various State statutes on the subject passed under the plenary police power of the States. The task before the framers of the Eighteenth Amendment was to convey to Congress an amount of power to be evidenced in written terms. If the intention was to seek to convey such power to the extent sought to be exercised in some of the States, the written terms must have expressed such intention. And while it is at best doubtful whether it would have passed into the fundamental law of the land in such a form, the fact remains, that from all of the examples before them, the framers of this fundamental law chose, not the most extreme and unlimited or in fact unwarranted examples, but that form of legislation which had been construed as excluding prohibi-

tion against medicinal prescription. This circumstance, we confidently submit, removes the subject from the realm of controversy.

The statutes cited by the Government, therefore, not only emphasize the meaning of the term "beverage purpose," but show that such term was carefully and advisedly selected as a term of limitation. The obvious intention displayed from the very words of the Eighteenth Amendment is that Congress should not have a police power which was a roving commission to deal with the subject.

The District Attorney, on page 2 of his Reply Brief, curiously enough states that the case of *State v. Durein*, 70 Kans., 1 (aff'd 208 U. S., 613), is conclusive on the point of the right of the State legislature to prohibit the prescription of any intoxicating beverage as a medicine.

Even were this statement correct, the fact would have no determining effect upon the decision in this case, where we are dealing solely with a Federal Constitutional Amendment of distinct limitations.

His assertion, however, is quite unsupported by the facts in that case which were thus tersely summarized in the first paragraph of the case:

"On June 28, 1902, Miss Blanche Boies, Mrs. Henry Howard and others of a praying-band, five in number, went to certain rooms in a brick building at No. 402 Quincy Street, in the City of Topeka, and found there a flourishing beer-saloon. In the place were a bar and shelves and bottles and glasses and tables. Men were sitting at the tables playing cards, and a dozen others were at the bar drinking. A man behind the bar was handing out beer to them, which they drank and

paid for, one of the women seeing the money pass. One of the women asked the bartender if that was Mr. Fritz Durein's saloon, and he said it was. She asked for the proprietor, and he said he was Fritz Durein. In the course of a conversation with him he told the women he did not think it wrong to keep a saloon; that it was not against his religion, and that he intended to keep right on running a saloon and selling beer. He drank a glass of it himself and asked the women to have some."

It was urged on behalf of this saloon keeper that inasmuch as the statute provided that no one should sell liquors for medical, mechanical or scientific purposes without a permit obtained from a Probate Judge, that the statute was unconstitutional and that, therefore, the saloon keeper could not be punished for selling liquors without the permit. The Court determined that the statute was not unconstitutional in this respect. It will be noted that the power of a state to prohibit prescriptions by a physician was not in issue; that on the contrary the statute contained no prohibition of such subject, but did contain regulations. It will further be noted that medicinal prescriptions were in nowise involved in the litigation, the accused being a saloon keeper accused of selling liquor over the counter in his saloon.

Moreover, it is increasingly clear to us, as we read the District Attorney's Reply Brief, that we have been unable to make intelligible to him our thought in referring to State statutes and State decisions on the subject of intoxicating liquors for beverage purposes. We have, nevertheless, devoted this discussion to citations in his Main and Reply Briefs, not because they are relevant, but

for the reason that we do not wish his argument, though irrelevant, to go unchallenged.

It was for such a reason that—in reply to the equally irrelevant allegation of the answer that some other physicians were not in accord with Dr. Lambert—we added the Appendix to our Main Brief.

We ask the indulgence of the Court in repeating from Point II of our Main Brief the following:

“In order to hold that Congress under the delegated police powers from the States, pursuant to the Eighteenth Amendment, could legislate as to the prohibition of medicinal prescriptions, it must be held that it thereby possesses a power which the States themselves never intended—and even were unable—to confer by legislative action.

“Moreover, in the present case the most convincing medical authority is to be found in the Appendix, to the effect, that, at times, it is essential to administer alcohol through the rectum.

“In order, therefore, to have the inhibition of the Volstead Act concerning medical prescriptions upheld, the words “appropriate legislation,” in the Amendment, must be construed as entitling Congress, under its commission to prevent the use of *intoxicating liquors for beverage purposes*, to forbid the administration of alcohol by means even of the nutritive or stimulating enema.”

**POINT III.**

**The claim of the District Attorney on his oral argument that a decision of this case in complainant's favor would entail confusion in the enforcement of law, is unwarranted.**

This is not a case where the decision of unconstitutionality would go to an entire act of Congress and leave a subject uncovered by legislation.

In the main, the Volstead Act is not affected by this suit. Certain very limited provisions as to prescriptions by physicians are alone involved. There would still remain existing regulations which would largely cover the subject, after the prohibition as to medicinal prescriptions in excess of a pint per ten days had been declared null and void. If need be, these could be promptly supplemented by additional regulations.

Moreover, as was stated on the oral argument for complainant, inasmuch as the prohibition of medical prescriptions constitutes a usurpation by Congress of authority never conferred upon it—there should—upon the rendering of judicial opinion to this effect—be an instant realization on the part of the Executive Department of the Government that the subject may be adequately and finally covered by regulations, without recourse to further legal proceedings.

As was stated also on oral argument—in order to prevent any possible immediate confusion as to the sufficiency of the regulations concerning physicians' prescriptions, there might well be—in accordance with the procedure followed in other cases—an interval between the informal an-

nouncement of conclusion on the part of the Court and the rendering of the formal opinion.

It was with a like thought that the complainant's counsel on oral argument volunteered the additional suggestion as to a suspension of the operation of any decree declaring that part of the Volstead Act complained of to be unconstitutional, during the period in which the necessity of any further regulations would be under consideration by the Executive Department. For complainant and the great company of physicians and surgeons whom he represents are as anxious, as should be the Government, that appropriate regulations prevent improper practices, but at the same time allow those trained in their profession to practise it in accordance with their best, and, therefore, untrammeled scientific judgment in their ministry of mercy, through the saving and prolongation of life.

No further legislation by Congress would seem to be necessary. In regard to sacramental wines, practically the only regulation on the entire subject is that the priest, rabbi or clergyman produce his credentials. The complainant and his distinguished associates have voluntarily suggested, in Brief and on oral argument, that they would, in order to detect and apprehend and adequately punish the criminal bootlegging doctor, welcome and promote regulations distinctly more drastic than Congress, in its wisdom, or unwisdom, has made applicable to the unworthy representative of the Church.

We desire to repeat and emphasize all that was said in this regard under Point VII of our Main Brief.

**POINT IV.**

**Defendants' motion to dismiss should be denied and the complainant should be granted the relief prayed for in the complaint.**

Respectfully submitted,

DAVIES, AUERBACH & CORNELL,  
Attorneys for Complainant.

JOSEPH S. AUERBACH,  
MARTIN A. SCHENCK,  
Of Counsel.

# **TRANSCRIPT OF RECORD**

---

---

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1908**

**No. 245**

---

**EDWARD AND JOHN BURKE, LIMITED, APPELLANT,**

**v.**

**DAVID H. BLAIR, COMMISSIONER OF INTERNAL  
REVENUE, ET AL.**

---

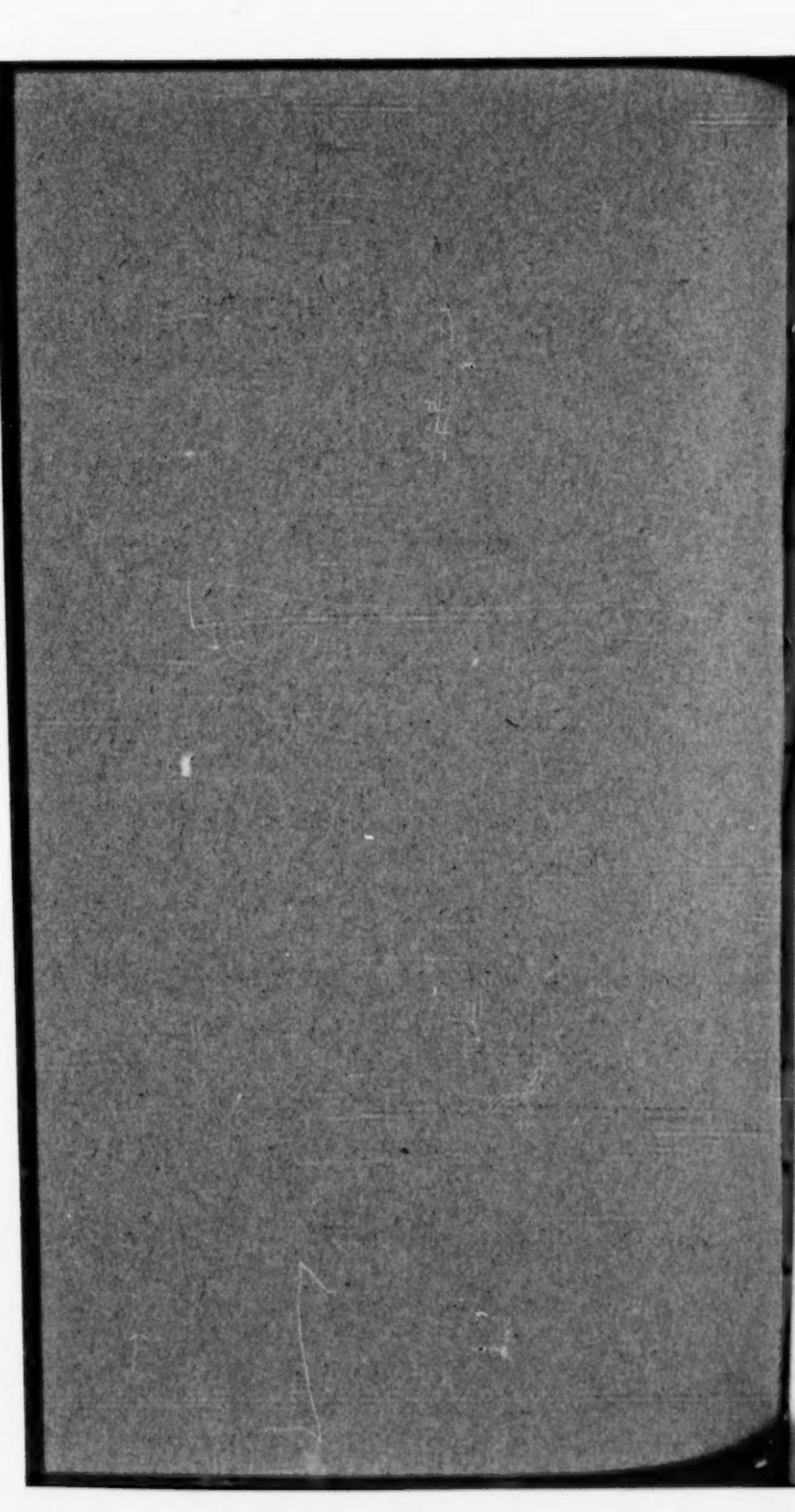
**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK**

---

---

**FILED MARCH 15, 1909**

**(39,456)**



(29,456)

SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1923

No. 245

EDWARD AND JOHN BURKE, LIMITED, APPELLANT,

vs.

DAVID H. BLAIR, COMMISSIONER OF INTERNAL  
REVENUE, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF NEW YORK

INDEX

Original Print

Record from U. S. district court for the southern district of New

York .....	1	1
Bill of complaint.....	1	1
Subpoena .....	11	6
Notice of appearance and demand.....	12	7
Answer with notice of filing.....	13	7
Notice of motion to dismiss.....	16	9
Stipulation as to hearing.....	17	9
Memorandum, Knox, J.....	18	9
Decree dismissing bill.....	19	10
Petition for and order allowing appeal.....	20	10
Assignment of errors.....	21	11
Bond on appeal..... (omitted in printing) ..	23	11
Citation and service..... (omitted in printing) ..	26	12
Stipulations as to transcript of record.....	27	12
Clerk's certificate.....	30	13



[fol. 1]

IN THE

**DISTRICT COURT OF THE UNITED STATES FOR THE  
SOUTHERN DISTRICT OF NEW YORK**

In Equity

EDWARD AND JOHN BURKE, LIMITED, Complainant,  
against

DAVID H. BLAIR, Commissioner of Internal Revenue; E. C. Yellowley, Acting Federal Prohibition Director for the State of New York, and William Hayward, United States Attorney for the Southern District *District* of New York, Defendants.

**BILL OF COMPLAINT**

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, Sitting in Equity:

The complainant, Edward and John Burke, Limited, brings this its bill of complaint against the above-named defendants and re-[fol. 2] speetfully shows as follows:

I. Complainant, Edward and John Burke, Limited, is a corporation duly organized and existing under the laws of the State of New York, with its principal place of business in the City of New York.

II. Complainant is informed and verily believes, and therefore alleges on information and belief:

That defendant David H. Blair is the duly appointed and acting Commissioner of Internal Revenue of the United States; that defendant E. C. Yellowley is a subordinate of the Commissioner of Internal Revenue, and is the Acting Federal Prohibition Director for the State of New York; that these defendants and their subordinates are by law charged with the duty of enforcing the terms and provisions of acts of Congress passed under the authority of the Eighteenth Amendment to the Constitution of the United States, including the National Prohibition Act, approved October 28, 1919, and including also the Act of Congress approved November 23, 1921, entitled "An Act Supplemental to the National Prohibition Act," commonly known as the Willis-Campbell Act, and the regulations made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, for the enforcement of said Acts.

That defendant William Hayward is the duly appointed and acting United States District Attorney for the Southern District of New York, and is charged with the duty of prosecuting offenders against said Acts of Congress and the said regulations.

III. This is a suit of a civil nature, arising under the Constitution and the laws of the United States. The matter in controversy [fol. 3] exceeds the sum or value of Three Thousand Dollars (\$3,000), exclusive of interest and costs.

IV. Edward and John Burke, Limited, a corporation created under the laws of the United Kingdom of Great Britain and Ireland and located at Dublin, Ireland, has been engaged for more than seventy years in various activities, including the bottling, marketing and distributing, in the markets of the world, of an intoxicating liquor known as Guinness's Stout. Many years ago it established and, until the incorporation of the complainant in 1919, maintained in New York City a branch of its business, which included the importation, sale and distribution of Guinness's Stout throughout the United States. Through the activities of this branch there was established in this country a large demand and a favorable market for Guinness's Stout, its annual gross sales thereof, prior to the war restrictions imposed by the Government of the United States, amounting to from \$500,000 to \$700,000, and yielding large profits. Complainant was incorporated under the laws of the State of New York on or about November 18, 1919, as a subsidiary of the English corporation above-named, to carry on the business previously carried on by said branch, and on that date succeeded to all the property, rights, trade-mark, trade name, stock on hand, and other assets of said corporation used or employed in carrying on business in this country, and since that time, to the extent permitted by law as hereafter stated, complainant has been carrying on and conducting the business formerly carried on and conducted by the United States branch of said English corporation.

V. At the time of the passage of the National Prohibition Act, complainant had on hand as a part of its stock in trade a large [fol. 4] amount of Guinness's Stout, theretofore lawfully acquired and then lawfully held, upon which all taxes had been duly paid. The said Act permitted the sale of intoxicating liquors, including stout, for medicinal purposes, and complainant, believing that the same could be lawfully sold for such purposes, did not attempt to export it, which would have involved a serious financial loss. In October, 1921, the Treasury Department prepared and promulgated regulations under the National Prohibition Act, which permitted the sale of Guinness's Stout for medicinal purposes, and complainant, in accordance with such regulations, duly prepared, and on November 10, 1921, filed its application with the Federal Prohibition Director for the State of New York for a permit to sell its said stout for medicinal purposes. The Prohibition Director had been expressly authorized on November 5, 1921, by the Federal Prohibition Commissioner to issue a permit to complainant to sell its Guinness's Stout for medicinal purposes, but in anticipation of the passage of said Willis-Campbell Act, which was passed and approved November 23, 1921, he refused to issue to complainant the permit so requested as aforesaid, and after the passage of the said Act re-

fused to issue to complainant any permit whatsoever to sell its said stout for medicinal purposes upon the ground that said Act had made the sale of stout for medicinal purposes unlawful. At the time of the passage of the Willis-Campbell Act the complainant had on hand, and still has on hand, a large quantity of Guinness's Stout, of the fair value of Thirty-five Thousand Dollars (\$35,000), lawfully acquired and lawfully held, upon which all taxes had been paid, and which will be wholly lost to it unless relief be granted it by this court. Complainant's right to continue to import and sell [fol. 5] Guinness's Stout for medicinal purposes is a valuable property right, and this will be destroyed, likewise, unless relief be granted it by this court, and complainant will suffer great and irreparable damage thereby, the extent of which it is impossible to estimate.

VI. Guinness's Stout, as imported into this country and as heretofore sold by complainant, consists solely of pale malt, hops, and a certain amount of roast malt or barley, with the addition of water. Its alcoholic content, by volume, is from seven to eight per cent. Complainant is informed and believes and therefore alleges that its use in England and foreign countries, and also in the United States during the period in which its sale was permitted, is largely and predominatingly for medicinal purposes; and that its use in this country for beverage purposes was slight and negligible in comparison with its use as a medicine and for general non-beverage purposes. Complainant and its predecessor for many years habitually advertised its Guinness's Stout to the trade as a valuable medicinal agent in pulmonary troubles, as useful to nursing mothers, in convalescent cases, for persons in a low or run-down state of health, etc. Over fifty per cent of the sales of Guinness's Stout made by complainant and its predecessor in the United States were made directly to wholesale druggists and grocers in New York, Boston, Philadelphia, Washington, Pittsburgh, Chicago, Milwaukee, Saint Paul, Minneapolis, Kansas City, Saint Louis, New Orleans, and other cities.

Prior to the prohibition of the sale of stout in this country, it was generally and habitually prescribed by a very large number of eminent and reputable physicians in the bona fide belief that it possessed curative powers, as well as health-giving and strength-producing [fol. 6] properties. Complainant's predecessor in 1904, with no National Prohibition legislation then in view and for the purpose of securing data to be used in opposition to a proposed increase in the tariff on stout, sent out questionnaires to a large number of eminent and reputable physicians of New York and elsewhere, fairly representative of the medical profession generally, asking them to state whether, in their judgment, Guinness's Stout possessed medicinal value, and if so, in what cases they prescribed it. Four hundred thirty-five (435) replies were received, from which it appeared that 96 did not prescribe stout as a medicine, and 339, or 78 per cent., stated that in their judgment stout possessed valuable medicinal qualities, and that they habitually prescribed it for their patients, designating the cases in which they felt it was a proper and useful medi-

cine. Complainant alleges, upon information and belief, that the foregoing is fairly typical of views entertained by physicians as to the medicinal value of Guinness's Stout.

Standard works on the practice of medicine regard stout as possessing medicinal qualities and recommend its use as a curative agent in many cases of disease and ill health.

VII. The Willis-Campbell Act purports to provide that only spirituous and vinous liquor may be prescribed for medicinal purposes, and all permits to prescribe and prescriptions for any other liquor shall be void, and severe penalties are provided by it and by the National Prohibition Act for violations of its terms and for violations of the regulations of the Commissioner of Internal Revenue made for its enforcement. The defendants claim that this provision of the Willis-Campbell Act is valid, and, based upon such claim, the defendant Acting Federal Prohibition Director and his predecessor in office have refused, and the said defendant still refuses, to issue [fol. 7] to complainant a permit to sell its stout for medicinal purposes, and have likewise refused to issue to pharmacists permits to purchase said stout, and to physicians permits to prescribe the same for medicinal purposes. The defendants threaten to arrest and prosecute complainant's agents, servants and employees if it undertakes to sell stout for medicinal purposes, and to arrest and prosecute pharmacists if they purchase the same for medicinal purposes, and physicians if they prescribe the same for medicinal purposes. Complainant is lawfully entitled, for reasons stated in the following paragraph, to sell its stout for medicinal purposes, and pharmacists are lawfully entitled to purchase the same for that purpose, and physicians are lawfully entitled to prescribe the same for their patients; but if complainant attempts to exercise this right, or if such others undertake to exercise their rights, the defendants, without lawful warrant or authority so to do, threaten to and, unless restrained by this court from so doing, will institute a multiplicity of suits and prosecutions and insist upon the imposition of sever penalties, including fines and imprisonment and various forfeitures of property provided by the Acts of Congress and said regulations, and complainant's property and business will be unlawfully taken and destroyed, all to its irreparable damage. The penalties imposed by said Acts for a violation thereof are so large and severe as to deter complainant from asserting its rights except through the aid of a court of equity.

VIII. Complainant is advised by counsel and verily believes that the Willis-Campbell Act, in so far as it prohibits the prescribing of complainant's stout for medicinal purposes and making void all permits to prescribe, and prescriptions for it, is unconstitutional and void because it is an unauthorized and unlawful attempt on the part [fol. 8] of Congress to legislate over a subject matter not delegated to it by the Eighteenth Amendment, or by any other provision of the Federal Constitution, but reserved to and remaining within the exclusive control of the several States of the Union. Complainant is

also advised by counsel and verily believes that the Act is unconstitutional and void because it, in effect, prohibits the sale and use of complainant's stout for medicinal purposes while permitting the sale of all vinous and spirituous liquors for medicinal purposes, although they contain a larger alcoholic content, and are much more likely to be used for beverage purposes, and is, therefore, as to complainant, arbitrary and unreasonable, and if enforced, its effect will be to deprive complainant of its property without due process of law, and to take its property for public use without just compensation, in violation of the Fifth Amendment to the Federal Constitution. The said regulations of the Commissioner of Internal Revenue, under which the defendant Prohibition Director refuses to issue permits to complainant to sell, to pharmacists to purchase, and to physicians to prescribe the complainant's stout, and under which the defendants threaten to prosecute complainant and such others as aforesaid, are, as complainant is advised by counsel and verily believes, null and void for the reasons above stated. The laws of the State of New York, where complainant's place of business is located, permit the sale of stout for medicinal purposes, and these laws, complainant is informed by counsel and verily believes, are valid and are the measure of complainant's rights.

IX. Forasmuch, therefore, as complainant is without remedy in the premises except in a court of equity, and to the end that it may obtain from this Honorable Court the relief to which it is en-[fol. 9] titled, it respectfully prays that the above-named defendants, and each of them, be directed to make a full, true and perfect answer to this bill of complaint, but not under oath, an answer under oath being expressly waived, and that said defendants, their agents, servants and employees, and each and every one of them, be enjoined and restrained from in any manner enforcing, or attempting to enforce or cause to be enforced against the complainant, its officers, servants and employees, or any of them, any of the pains, penalties or forfeitures provided in and by the aforesaid Acts of Congress or any rules or regulations of the Commissioner of Internal Revenue, issued with the approval of the Secretary of the Treasury, in so far as said Acts of Congress or said rules or regulations purport to prohibit the sale by complainant of Guinness's Stout to pharmacists for medicinal purposes, and from arresting and prosecuting the complainant, its officers, servants and employees, or any of them, by reason of making any such sale or sales, and that defendant E. C. Yellowley be enjoined and restrained from refusing to issue to complainant and to pharmacists and to physicians permits for the sale and purchase of Guinness's Stout for medicinal purposes, and for the bona fide prescription thereof by physicians for their patients.

Complainant further prays that it be granted a restraining order and preliminary injunction pending the final hearing in this case whereby the said defendants, their agents, servants and employees, and each and every one of them, may be enjoined and restrained as heretofore prayed, and that upon the final hearing said injunction be made perpetual.

Complainant further prays that a writ of subpoena be issued herein directed to the said defendants, and each of them, commanding them [fol. 10] on a day set to appear and answer the bill of complaint herein.

Edward and John Burke, Limited, By Tobias C. Fogel, President. Moore & Bell, Solicitors for Complainant, 25 Broad Street, Borough of Manhattan, New York City.

AFFIDAVIT OF TOBIAS C. FOGEL TO ABOVE PAPER

[Omitted in printing]

[fol. 11] IN UNITED STATES DISTRICT COURT

EQUITY SUBPOENA

The President of the United States of America to David H. Blair, Commissioner of Internal Revenue; E. C. Yellowley, Acting Federal Prohibition Director for the State of New York, and William Hayward, United States Attorney for the Southern District of New York, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by Edward and John Burke, Limited, and to further do and receive what the said Court shall have considered in this behalf. And this you are not to omit under the penalty on you and each of you of two hundred and fifty dollars (\$250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 22d day of November, in the year One Thousand Nine Hundred and Twenty-two, and of the Independence of the United States the One Hundred and Forty-seventh.

Alex Gilchrist, Jr., Clerk. Moore & Bell, Plaintiff's Sol'r.

[fol. 12] The Defendants are required to file their answer or other defense in the above cause in the Clerk's Office on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

Alex Gilchrist, Jr., Clerk. (Seal.)

## U. S. DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

## NOTICE OF APPEARANCE AND DEMAND

You will please take notice that I am retained by, and appear as attorney for, the Defendants in this action, and demand service of a copy of the complaint and all papers in this action upon me, at my office in the United States Court and Post Office Building, in the City of New York, Borough of Manhattan.

Yours, William Hayward, United States Attorney, Attorney for Defendants. New York, December 13, 1922. To Messrs. Moore & Bell, #25 Broad Street, Attorneys for Plaintiff.

---

[fol. 13] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

## ANSWER, WITH NOTICE OF FILING

Now come the defendants and for an answer to the bill of complaint herein by their attorney William Hayward, United States Attorney for the Southern District of New York, respectfully allege:

First. Defendants move that the bill of complaint herein and divers parts thereof be dismissed and assign the following grounds for this motion, namely:

1. The suit is in effect one against the United States and does not aver or show that the United States has consented to be sued herein.
2. The court has no jurisdiction to grant the relief prayed for or any part thereof.
3. The bill does not present a cause of action in equity under the Constitution of the United States.
4. The bill does not disclose a cause of action equitable in its nature, civil in its character and arising under the Constitution of the United States.
5. The facts alleged in the bill are insufficient to constitute a valid cause of action in equity.

[fol. 14] 6. It appears from the bill that the complainant has a plain, adequate and complete remedy at law.

Second. Defendants have no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph VI of the complaint, but deny on information and belief that Guinness's Stout has any therapeutic value or that it possesses curative powers

or that it has health-giving and strength-producing properties. Defendants further allege on information and belief that standard works on practice and the science of physiology and biology maintain that neither stout nor any other malt liquors possess any medicinal quality, and deprecate the use of such alcoholic beverages as curative agents.

Third. Defendants deny the allegation contained in Paragraph VII of the bill of complaint, that complainant is lawfully entitled to sell its stout for medicinal purposes, and further deny that pharmacists are lawfully entitled to purchase said stout for medicinal purposes, and further deny that physicians are lawfully entitled to prescribe the same for their patients. Defendants further deny that threats which they have made to enforce the law against the prescription of stout for medicinal purposes are without lawful warrant or authority.

Fourth. Defendants deny the allegations in Paragraph VIII of the complaint in so far as it is therein alleged that the Willis-Campbell Act is unconstitutional and void, and further deny so much of said paragraph as alleged that the regulations of the Commissioner of Internal Revenue under which the Prohibition Director refuses to issue permits for the sale, purchase and prescription of complainant's stout are unconstitutional and void.

Wherefore the defendants pray that the bill of complaint herein be dismissed and that the defendants have such other and further [fol. 15] relief as to the Court may seem just and that the defendants recover their costs and disbursements herein.

William Hayward, United States Attorney for the Southern District of New York, Attorney for Defendants. Office & P. O. Address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

(Endorsed)

SIR:

You will please take notice that an answer of which the within is a copy, was this day duly entered in the within-entitled action, in the office of the Clerk of the U. S. Dist. Court, S. D. N. Y.

Dated, N. Y., Dec. 19, 1922.

Yours, etc., William Hayward, U. S. Attorney, Attorney for Defendants. To Messrs. Moore & Bell, Attorneys for Compl.

[fol. 16] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF MOTION TO DISMISS

Sirs:

Please take notice that the undersigned will move this Court at a term thereof to be held in Room 237 United States Courts and Post Office Building, Borough of Manhattan, City of New York, on January 19, 1923, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order dismissing the complaint on the several grounds set out in Paragraph First of the answer herein and for such other and further relief as to the Court may seem just.

Dated, New York, N. Y., January 17, 1923.

Yours, etc., William Hayward, United States Attorney for the Southern District of New York, Attorney for Defendants. Office and Post Office Address: U. S. Courts & P. O. Bldg., Borough of Manhattan, City of New York.

---

[fol. 17] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION AS TO HEARING

It is hereby stipulated and agreed between the attorneys for the respective parties to the above entitled action that the hearing upon the defendants' motion to dismiss the bill of complaint herein shall be and the same hereby is adjourned from the 12th day of January, 1923, to the 19th day of January, 1923.

Dated, New York, January 10, 1923.

Moore & Bell, Attorneys for Complainant. William Hayward, Attorney for Defendants.

---

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM, KNOX, J.

Most, if not all of the matters of substance set forth in complainant's bill as a basis for the relief asked seem to be well within the

ruling of Judge Garvin in the case of Piel Bros. v. Day, 278 Fed. 223, affirmed in 281 Fed. 1022. So far as the alleged discrimination of the Willis-Campbell bill against malt liquors is concerned, I think that in so legislating Congress did not go without the bounds of any constitutional limitation. The within motion will be granted and complainant's bill dismissed.

Jno. C. Knox, U. S. D. J. 2/27/23.

---

[fol. 19] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

DECREE

This cause came on to be heard this term upon motion by the defendants to dismiss the bill of complaint, and was argued by counsel; and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed that the bill of complaint be dismissed and that defendants have judgment against the complainants for their costs to be taxed.

L. Hand, United States District Judge for the Southern District of New York. Dated, March 2d, 1923.

---

[fol. 20] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION FOR APPEAL AND ORDER ALLOWING APPEAL

The above-named complainant conceiving itself aggrieved by a decree made and entered on the 2d day of March, 1923, in the above entitled cause, does hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and it prays that this appeal may be allowed and that the transcript of the record, pleadings and papers upon which the said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Moore and Bell, Solicitors for Complainant.

The foregoing claim for appeal is allowed.

L. Hand, United States District Judge for the Southern District of New York. Dated, March 2d, 1923.

[fol. 21] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS

The complainant hereby assigns error in the final judgment or decree of the District Court herein entered March 2, 1923, in the following respects:

First. The Court erred in dismissing the bill of complaint herein.

Second. The Court erred in holding that the Act of Congress, approved November 23, 1921, entitled "An Act Supplemental to the National Prohibition Act," commonly known as the Willis-Campbell Act, was duly passed in the lawful exercise of constitutional authority in so far as it purports to prohibit the prescription and use of malt liquors, including Guinness's Stout, for medicinal purposes.

Third. The Court erred in failing and refusing to hold that the said Act of Congress is unconstitutional and void in the particular above stated because in excess of the constitutional power of Congress to enact the same.

Fourth. The Court erred in holding that Congress, under the [fol. 22] Eighteenth Amendment to the Constitution of the United States, possesses the lawful power to prohibit the use of malt liquors, including Guinness's Stout, for medicinal purposes.

Fifth. The Court erred in failing and refusing to hold that the regulation of the use of malt liquors, including Guinness's Stout, for medicinal purposes is exclusively within the control of the several States.

Sixth. The Court erred in holding that it is within the power of Congress by legislative fiat to declare that malt liquors, including Guinness's Stout, have no therapeutic or medicinal value, and that such declaration is binding upon the courts of the United States.

Seventh. The Court erred in failing and refusing to hold that the question whether malt liquors, including Guinness's Stout, possess a therapeutic or medicinal value is a judicial question, to be determined by the courts.

Moore and Bell, Solicitors for Complainant.

[fols. 23-25] DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE SOUTHERN DISTRICT OF NEW YORK, IN THE SECOND CIRCUIT

[Title omitted]

BOND ON APPEAL [for \$250.00; filed and approved Mar. 6, 1923; omitted in printing]

[fol. 26] CITATION ON APPEAL [Omitted in printing]

(Endorsed:) Copy received. March 3, 1923. Wm. Hayward,  
U. S. Attorney.

[fol. 27] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION FOR RECORD ON APPEAL

It is hereby stipulated and agreed by and between the parties hereto, by their respective counsel, that the following portions of the record shall constitute the transcript and record on appeal in this case, and that the Clerk of the District Court shall transmit only the papers herein designated:

1. Original bill of complaint.
2. Subpoena.
3. Defendants' notice of appearance and demand.
4. Answer to the bill of complaint.
5. Defendants' notice of motion, dated January 17, 1923.
6. Stipulation adjourning hearing from January 12 to January 19, 1923.
7. The opinion of the court filed in this cause.
8. The decree entered in this cause on March 2, 1923.
9. Petition for, and order allowing, appeal.

[fol. 28] 10. Assignment of errors filed by complainant.

11. The bond of complainant on appeal.
12. The citation issued on such appeal, with acknowledgment of service.
13. Stipulation for record on appeal.

Dated, New York, March 5, 1923.

Moore & Bell, Solicitors for Complainant. William Hayward,  
Attorney for Defendants.

[fol. 29] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, New York, March 9, 1923.

Moore & Bell, Attorneys for Complainant. Wm. Hayward,  
U. S. Attorney, Attorney for Defendants.

O. K. W. J. E.

[File endorsement omitted.]

---

[fol. 30] UNITED STATES OF AMERICA,  
Southern District of New York, ss:

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 9th day of March in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the said United States the one hundred and forty-seventh.

Alex. Gilchrist, Jr., Clerk. (Seal of District Court of the United States, Southern District.)

Endorsed on cover: File No. 29,456. S. New York D. C. U. S.  
Term No. 245. Edward and John Burke, Limited, appellant-, vs.  
David H. Blair, Commissioner of Internal Revenue, et al. Filed  
March 15th, 1923. File No. 29,456.

Office Supreme Court, U. S.

~~RECEIVED~~

NOV 17 1923

WM. B. STANSBURY

CLERK

# Supreme Court of the United States,

OCTOBER TERM, 1923.

No. 245.

---

EDWARD AND JOHN BURKE, LIMITED,

*Appellant,*

*vs.*

DAVID H. BLAIR,

Commissioner of Internal Revenue, *et al.*

*Appellees.*

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

---

## BRIEF FOR APPELLANT.

---

SAMUEL W. MOORE,  
MARCUS L. BELL,

*Solicitors for Appellant.*



## INDEX.

	PAGE
STATEMENT .....	1
SPECIFICATION OF ERRORS.....	6
ARGUMENT:	
I. It is alleged in Paragraph VI of the bill that Guinness's Stout is a valuable medi- cinal agent, and this allegation is to be taken as true, for the purpose of this ap- peal, notwithstanding the provisions of the Willis-Campbell Act .....	8
II. The grant of power contained in the Eight- eenth Amendment is limited by the reser- vations of the Tenth Amendment. The two amendments effect a division of legislative power over intoxicating liquor, the Con- gress and State Legislatures being vested with concurrent legislative power over intoxicating liquor for beverage purposes, and the Legislatures of the several States retaining exclusive legislative power over intoxicating liquor for non-beverage pur- poses .....	16
III. The incidental power possessed by Con- gress to make effective its power to pro- hibit the sale of intoxicating liquor for beverage purposes, cannot be constitution- ally exercised so as to prohibit its sale for non-beverage purposes .....	21

IV. The enforcement of the Willis-Campbell Act will deprive the appellant of its prop- erty without due process of law, and take its property for public use without just compensation, in violation of the Fifth Amendment .....	49
--	----

## CASES AND AUTHORITIES CITED.

	PAGE
Adair <i>v.</i> United States, 208 U. S. 161.....	39
Bailey <i>v.</i> Drexel Furniture Co., 259 U. S. 20, 44....	26
Block <i>v.</i> Hirsh, 256 U. S. 136.....	14
Boyd <i>v.</i> United States, 116 U. S. 616.....	37
Buffington <i>v.</i> Day, 11 Wall. 113.....	43
Caldwell <i>v.</i> Texas, 137 U. S. 692.....	53
Chicago & N. W. Ry. <i>v.</i> Nye Schneider Fowler Co., 43 Sup. Ct. 55 .....	49
Child Labor Law .....	23, 25
Davidson <i>v.</i> New Orleans, 96 U. S. 97.....	51
Detroit United Ry. <i>v.</i> City of Detroit, 248 U. S. 429, 541 .....	8
Eighteenth Amendment, U. S. Const., 11, 16, 19, 22, 48, 56	
Fairbank <i>v.</i> United States, 181 U. S. 283.....	34
Fifth Amendment, U. S. Const.....	49, 52
Foster, Federal Practice, 6th Ed., Sec. 366.....	8
Fourteenth Amendment, U. S. Const.....	49, 52
Future Trading Act.....	28
Giozza <i>v.</i> Tiernan, 148 U. S. 657.....	54
Hammer <i>v.</i> Dagenhart, 247 U. S. 251.....	23, 26
Hill <i>v.</i> Wallace, 259 U. S. 44.....	28
Howard <i>v.</i> Illinois Central R. Co., 207 U. S. 462....	32
Hurtado <i>v.</i> California, 110 U. S. 516.....	52
Kansas <i>v.</i> Colorado, 206 U. S. 46 .....	45
Keller <i>v.</i> United States, 213 U. S. 138.....	44
Krouse <i>v.</i> Brevard Fannin Co., 249 Fed. 538.....	8

	PAGE
Lambert <i>v.</i> Yellowley, 291 Fed. 640.....	13
Leeper <i>v.</i> Texas, 139 U. S. 462.....	53
McGehee on Due Process of Law, p. 60.....	54
Missouri Pacific R. Co. <i>v.</i> Humes, 115 U. S. 513.....	51
Monongahela Navigation Co. <i>v.</i> United States, 148 U. S. 312 .....	15, 37
Mugler <i>v.</i> Kansas, 123 U. S. 623.....	56
National Prohibition Act .....	9, 48, 49, 55
Producers Transp. Co. <i>v.</i> R. R. Comm., 251 U. S. 228 .....	14
Purity Extract Co. <i>v.</i> Lynch, 226 U. S. 192.....	21
R. R. Comm. of Wis. <i>v.</i> C., B. & Q. R. R., 257 U. S. 563 .....	46
Rhode Island <i>v.</i> Palmer, 253 U. S. 350.....	48
Ruppert <i>v.</i> Caffey, 251 U. S. 264.....	20, 56
Scott <i>v.</i> City of Toledo, 36 Fed. 385.....	52
Shoemaker <i>v.</i> United States, 147 U. S. 282.....	14
Stromberg <i>v.</i> Holley, 260 Fed. 220.....	8
Tenth Amendment, U. S. Const., 16, 17, 19, 22, 28, 31, 34, 43, 45, 46, 48	48
Truax <i>v.</i> Corrigan, 257 U. S. 312, 332.....	50
United States <i>v.</i> DeWitt, 9 Wall. 41.....	41
United States <i>v.</i> Freund, 290 Fed. 411.....	12
United States <i>v.</i> Lanza, 43 Sup. Ct. 141.....	17
United States <i>v.</i> Ry. Emp. Dept., 286 Fed. 228...	8
Webb-Kenyon Act .....	17
Willis-Campbell Act.....2, 5, 6, 10, 16, 22, 31, 48, 49, 55	55
Willoughby on the Constitution, pp. 873, 874.....	54
Wilson Act .....	17

# Supreme Court of the United States,

OCTOBER TERM, 1923.

No. 245.

EDWARD AND JOHN BURKE, LIMITED,  
Appellant,

*vs.*

DAVID H. BLAIR, Commissioner of Internal Revenue, *et al.*,  
Appellees.

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

## BRIEF FOR APPELLANT.

### Statement.

This is an appeal from a decree of the lower court, dismissing for want of equity the complainant's bill which sought to enjoin the prohibition enforcement officers from interfering with the sale by complainant for medicinal purposes of a quantity of Guinness's Stout, lawfully acquired by it prior to the National Prohibition Act and now and then lawfully held by it, and also from interfering with the right of complainant to continue to carry on its business of importing and selling Guinness's Stout for medicinal purposes.

The basis of the complaint was the averment that the Act of Congress approved November 23, 1921, entitled "An Act Supplemental to the National Prohibition Act," commonly known as the Willis-Campbell Act, and the regulations made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, for the enforcement of said Acts, are unconstitutional and void, in so far as they prohibit the purchase, sale and use of Guinness's Stout for medicinal purposes. That portion of the Willis-Campbell Act alleged to be unconstitutional and void is as follows:

That only spirituous and vinous liquor may be prescribed for medicinal purposes, and all permits to prescribe and prescriptions for any other liquor shall be void.

Complainant's main contention is that while the Eighteenth Amendment has given Congress the power to prohibit the manufacture, sale and transportation of intoxicating liquor for *beverage* purposes, the power to permit, regulate or prohibit the use of intoxicating liquor for *non-beverage* purposes has been reserved to the several States; that while Congress possesses the incidental power to impose regulations upon the manufacture, sale and transportation of non-beverage liquor, so far as reasonably necessary to make effective its control over beverage liquor, such power is limited to reasonable regulation, and must stop short of the complete prohibition of the use of malt liquor for medicinal purposes, sought to be effected by the Willis-Campbell Act; and that the quoted portion of the Act is an unlawful and ineffectual effort on the part of Congress to exercise a legislative power which does not belong to it.

The allegations of the bill with respect to the medicinal character and use of Guinness's Stout, which for

the purposes of this appeal are to be taken as true, are set forth in paragraph VI of the bill (R. 3) in the following language:

"Guinness's Stout, as imported into this country and as heretofore sold by complainant, consists solely of pale malt, hops, and a certain amount of roast malt or barley, with the addition of water. Its alcoholic content, by volume, is from seven to eight per cent. Complainant is informed and believes and therefore alleges that its use in England and foreign countries, and also in the United States during the period in which its sale was permitted, is largely and predominately for medicinal purposes; and that its use in this country for beverage purposes was slight and negligible in comparison with its use as a medicine and for general non-beverage purposes. Complainant and its predecessor for many years habitually advertised its Guinness's Stout to the trade as a valuable medicinal agent in pulmonary troubles, as useful for nursing mothers, in convalescent cases, for persons in a low or run-down state of health, etc. Over fifty per cent of the sales of Guinness's Stout made by complainant and its predecessor in the United States were made directly to wholesale druggists and grocers in New York, Boston, Philadelphia, Washington, Pittsburgh, Chicago, Milwaukee, Saint Paul, Minneapolis, Kansas City, Saint Louis, New Orleans, and other cities.

"Prior to the prohibition of the sale of stout in this country, it was generally and habitually prescribed by a very large number of eminent and reputable physicians in the *bona fide* belief that it possessed curative powers, as well as health-giving and strength-producing properties. Complainant's predecessor in 1904, with no National Prohibition legislation then in view and for the purpose of securing data to be used in opposition to a proposed increase in the tariff on stout, sent out questionnaires to a large number of eminent and

reputable physicians of New York and elsewhere, fairly representative of the medical profession generally, asking them to state whether, in their judgment, Guinness's Stout possessed medicinal value, and if so, in what cases they prescribed it. Four hundred thirty-five (435) replies were received from which it appeared that 96 did not prescribe stout as a medicine, and 339, or 78 per cent., stated that in their judgment stout possessed valuable medicinal qualities, and that they habitually prescribed it for their patients, designating the cases in which they felt it was a proper and useful medicine. Complainant alleges, upon information and belief, that the foregoing is fairly typical of views entertained by physicians as to the medicinal value of Guinness's Stout.

"Standard works on the practice of medicine regard stout as possessing medicinal qualities and recommend its use as a curative agent in many cases of disease and ill health."

It further alleged (R. 2) that complainant and its predecessor had been engaged for seventy years prior to the war restrictions imposed by the Government of the United States, in the importation, sale and distribution of Guinness's Stout, its annual gross sales amounting to from \$500,000 to \$700,000, and yielding large profits, and that at the time of the passage of the National Prohibition Act it had on hand as a part of its stock in trade a large amount of Guinness's Stout, of the fair value of \$35,000, theretofore lawfully acquired and lawfully held, upon which all taxes had been duly paid, and complainant, relying upon the permission contained in said Act to sell intoxicating liquor for medicinal purposes, made no attempt to export its stock on hand, since that would have involved serious financial loss. In October, 1921, the Treasury Department prepared and promulgated regulations under the National Prohibition

Act which permitted the sale of Guinness's Stout for medicinal purposes, but in view of the anticipated passage of said Willis-Campbell Act, which was afterward passed and approved November 23, 1921, the prohibition enforcement officers in New York refused to issue to complainant such a permit, notwithstanding the fact that on November 5, 1921, the Federal Prohibition Commissioner had expressly authorized the issue of such a permit to the complainant. The defendants claim that the above-quoted provision of the Willis-Campbell Act and the said regulations are valid, and based thereon, they have refused, and still refuse, to issue to complainant a permit to sell its stout for medicinal purposes, and they likewise refuse to issue to pharmacists permits to purchase such stout, and also to physicians to prescribe the same for medicinal purposes. They threaten to arrest and prosecute complainant's agents, servants and employees if it undertakes to sell stout for medicinal purposes, involving the imposition of severe penalties, including fines, imprisonment and forfeiture of property, and in the same manner to prosecute pharmacists if they purchase stout for medicinal purposes, and physicians if they prescribe the same for medicinal purposes. The penalties imposed by said Acts for the violation thereof are so large and severe as to deter complainant from asserting its rights except through the aid of a court of equity. The laws of the State of New York, where complainant's business is located, permit the sale of its stout for medicinal purposes. Complainant's right to sell for medicinal purposes its stock on hand, as well as its right to continue to import and sell Guinness's Stout for medicinal purposes will be lost, to its irreparable damage, unless relief be granted.

It is further alleged (R. 4) that the Willis-Campbell Act is unconstitutional and void for the reasons above

stated, for the reason that it amounts to a taking of complainant's property without due process of law, and for the further reason that the prohibition of the sale and use of complainant's stout for medicinal purposes, while at the same time permitting the sale of all vinous and spirituous liquor for such purposes, although containing a larger alcoholic content and much more likely to be used for beverage purposes, is so arbitrary and unreasonable as to amount to unlawful discrimination; that the regulations of the Commissioner of Internal Revenue for the enforcement of the Willis-Campbell Act, in the respects above stated, are null and void, for the same reasons. An appropriate injunction is asked for.

The defendants filed their motion to dismiss the bill of complaint (R. 7). This motion was sustained by the lower court, and the bill dismissed for want of equity (R. 10). The court filed a brief memorandum (R. 9), following the opinion in *Piel Bros. v. Day*, 278 Fed. 223. The case comes here upon direct appeal, under Section 238 of the Judicial Code.

### Specification of Errors.

1. The Court erred in dismissing the bill of complaint herein.
2. The Court erred in holding that the Act of Congress, approved November 23, 1921, entitled "An Act Supplemental to the National Prohibition Act," commonly known as the Willis-Campbell Act, was duly passed in the lawful exercise of constitutional authority in so far as it purports to prohibit the prescription and use of malt liquors, including Guinness's Stout, for medicinal purposes.
3. The Court erred in failing and refusing to hold that the said Act of Congress is unconstitutional and void in the particular above stated because in excess of the constitutional power of Congress to enact the same.
4. The Court erred in holding that Congress, under the Eighteenth Amendment to the Constitution of the United States, possesses the lawful power to prohibit the use of malt liquors, including Guinness's Stout, for medicinal purposes.
5. The Court erred in failing and refusing to hold that the regulation of the use of malt liquors, including Guinness's Stout, for medicinal purposes is exclusively within the control of the several States.
6. The Court erred in holding that it is within the power of Congress by legislative fiat to declare that malt liquors, including Guinness's Stout, have no therapeutic or medicinal value, and that such declaration is binding upon the courts of the United States.
7. The Court erred in failing and refusing to hold that the question whether malt liquors, including Guinness's Stout, possess a therapeutic or medicinal value is a judicial question, to be determined by the courts.

**BRIEF.****I.**

**It is alleged in paragraph VI of the bill that Guinness' Stout is a valuable medicinal agent, and this allegation is to be taken as true, for the purposes of this appeal, notwithstanding the provisions of the Willis-Campbell Act.**

It is a well-settled rule of practice that "a motion to dismiss like a demurrer admits the truth of the allegations of fact in the bill (*Foster, Federal Practice*, 6th Ed., Section 366). The rule is thus stated in *Detroit United Ry. v. City of Detroit*, 248 U. S. 429, 541:

The question upon this appeal is: Did the bill, taking its allegations to be true, state grounds for relief to which the company was entitled upon the facts set forth? The action of the District Court (in dismissing the bill) was equivalent to sustaining a demurrer to the bill.

The same question is presented here. Did the bill of complaint, taking its allegations to be true, including the allegations in paragraph VI, state grounds for relief to which the complainant was entitled upon the facts set forth? The action of the lower court in sustaining the motion to dismiss must stand or fall upon the averments of the bill, unaided by the allegations of the answer (*U. S. v. Ry. Employes' Dept.*, 286 Fed. 288; *Krouse v. Brevard Tannin Co.*, 249 Fed. 538; *Stromberg v. Holley*, 260 Fed. 220).

In paragraph VI, quoted in the foregoing statement, it is averred that Guinness's Stout is a valuable medi-

cial agent in certain enumerated maladies; that its use generally is largely and predominantly for medicinal purposes, and that, prior to wartime restrictions upon its sale, its use in this country for beverage purposes was slight and negligible in comparison with its larger use as a medicine and for general non-beverage purposes; that over fifty per cent. of complainant's sales were to wholesale druggists and grocers throughout the country; that out of 435 questionnaires sent out in 1904 to reputable and representative members of the medical profession, 78 per cent. stated that, in their judgment, stout possessed valuable medicinal qualities, and that they habitually prescribed it for their patients in certain designated cases; that this is believed to be fairly typical of the views entertained by physicians as to the medicinal value of Guinness's Stout; and that standard works on the practice of medicine regard stout as possessing medicinal qualities and recommend its use as a curative agent in many cases of disease and ill health.

The case in this court, therefore, is one where it stands admitted that stout is a valuable therapeutic agent, and that its predominant use is for medicinal purposes. How, then, can Congress, acting under a constitutional grant of authority to prohibit the manufacture and sale of intoxicating liquor for *beverage* purposes, prohibit the sale of a recognized medicinal agent for medicinal purposes?

The National Prohibition Act itself recognizes the value of malt as well as other liquor for medicinal purposes, and contains carefully drawn provisions which permit the use of intoxicants for medicinal purposes. By Section 6 of Title II, a physician is required to procure a permit before he is permitted to prescribe any liquor, which by definition includes "malt or fermented liquor, liquids, and compounds." By Section 7, he may not prescribe liquor unless after a careful physical exam-

ination he in good faith believes that the use of such liquor as a medicine by such person is necessary and will afford relief to him for some known ailment. No more than a pint of spirituous liquor to be taken internally shall be prescribed for use by the same person within any period of ten days, and no prescription shall be filled more than once. He is required to keep a complete prescription record. By Section 8, a physician is required to use printed blanks furnished by the Commissioner, which shall be numbered consecutively. The books containing the prescription stubs shall be returned to the Commissioner when the prescription blanks have been used, and all unused or mutilated blanks shall be returned with the book. By Section 9, his permit may be revoked for cause. Provision is made by Section 6 for the purchase and sale of liquor for medicinal purposes upon obtaining a permit for that purpose.

The sale and use of sacramental wines, the use of liquor in hospitals and sanitariums, and the use of industrial alcohol are also permitted. A great number of regulations have been made by the Commissioner, with the approval of the Treasury Department, throwing safeguards and restrictions around the sale and prescription of intoxicating liquor for medicinal purposes. Progressively severe penalties are provided by Section 29 for a violation of the Act, or for a violation of the numerous regulations, and of the provisions of any permit.

So the law stood until the passage of the Willis-Campbell Act, which permits the use of spirituous and vinous liquor for medicinal purposes, but declares void all permits to prescribe and prescriptions for any other liquor. Following the passage of this Act and the adoption of the regulations for its enforcement, it became a penal offense to sell or purchase stout for medicinal purposes, and likewise a penal offense for a physician to prescribe stout for his patients.

It is to be noted that the Willis-Campbell Act does not contain a finding or declaration that stout, or any other malt liquor, is not a legitimate therapeutic agent; it merely prohibits its use as such. But it may be argued that Congress may be said to have reached this conclusion by implication, even though it is not expressly so stated in the Act. Even if this be admitted, for the sake of the argument, it is obvious that no declaration which Congress might make upon the subject is conclusive in this proceeding. Whether or not stout has value as a medicine is a question of fact, subject to judicial determination, and wholly beyond the control of legislative fiat.

The Eighteenth Amendment did not clothe Congress with the general power to invade the domain of medical authority, or to substitute its judgment for the judgment of the attending physician. Much less may it select a recognized therapeutic agent, such as Guinness's Stout, and declare that it may not be prescribed for a patient, even though the attending physician regards it as essential or indispensable in bringing about a restoration to health. If Congress can select one recognized medical agent, and lawfully prohibit its use, there is no limit to which it may not go. If it should continue its activities in this behalf, the medical profession of the country might soon find the remedies available for its continued warfare against disease sadly reduced in number. If Congress can place a legislative ban upon the use by physicians of recognized therapeutic agents, it can, by a parity of reasoning, make the use and prescription of certain specified remedies compulsory. The medical profession might thereby be wholly stripped of its authority. The treatment of disease would become standardized. There would be one, or possibly more than one, remedy for each known disease, and this would be ad-

ministered to rich and poor alike, without "any undue or unreasonable preference or advantage to any particular person," and without any "unjust discrimination," to quote the familiar language of the Interstate Commerce Act. The surgical profession might also be standardized. Certain operations might be prohibited, and others made compulsory, if Congress, in its wisdom, should so determine.

But the Eighteenth Amendment furnishes no justification for the assumption by Congress of control over the functions of the medical profession; nor does it empower Congress to declare by legislative enactment that an admitted therapeutic agent, recognized as such by the medical profession and employed by it in its battle with disease, shall be outlawed.

In two recent cases it has been held that it is not within the power of Congress to limit the amount of alcohol a physician may prescribe for his patient to a quantity not exceeding one-half pint within any period of ten days, as is attempted to be done in the National Prohibition Act. In *United States v. Freund*, 290 Fed. 411, the court, in speaking of this limitation, said:

So, too, they purport to determine the dosage of alcohol a physician may prescribe, and from him any patient shall receive, viz., not to exceed one-half pint for use within any period of 10 days. If therapeutics were an exact science, if diseases and their courses were of determined diagnosis and invariable prognosis, if patients were constituted alike and affected alike, if remedies could be admeasured by fixed rule, this provision would be valid. But since in respect to all these factors the truth is otherwise, every patient presenting to the physician a different problem for solution, this provision of the statute is invalid.

It is an extravagant and unreasonable attempt to subordinate the judgment of the attending

physician to that of Congress, in respect to matters with which the former alone is competent to deal, and infringes upon the duty of the physician to prescribe in accord with his honest judgment, and upon the right of the patient to receive the benefit of the judgment of the physician of his choice.

In the other case, *Lambert v. Yellowley*, 291 Fed. 640, the court said:

If this be true, it would seem not to be a function of the Congress, particularly under the amendment, to invade, as it were, the domain of medical authority, and to deprive patients of that which they need, and, by every principle of right and justice, are entitled to have. Having assumed so to do, it would appear that the action does not constitute legislation appropriate to the object sought to be attained through the adoption of the amendment. To me it seems reasonably clear that the right of the public to have available for its use, when required in the proper treatment of disease, an adequate supply of a valuable therapeutic agent, transcends the present power of Congress to decree otherwise upon the basis of expediency or policy.

Under the facts presented by the complaint, the danger that persons bent upon a violation of the Volstead law may, through the medicinal use of liquor, be furnished with a means of procuring intoxicants for beverage purposes, is to be overcome through regulations. These may be of the most stringent character, but they must, in my opinion, fall short of an actual prohibition against the use of liquor to the extent demanded by the reasonable necessities of the proper treatment of known ailments.

It is a rule of general application that the determination of questions of fact is a judicial and not a legisla-

tive question. As an illustration, the Constitution has entrusted the control over interstate commerce to Congress, and likewise the control of intrastate commerce to the several States. It is a familiar rule that it is for the courts to say what constitutes commerce of each class, and that it is wholly beyond the power of Congress to declare by legislative enactment that a given state of facts shall constitute intrastate commerce or interstate commerce, as the case may be. Such a declaration would not be accepted by the courts. So, in like manner, it is not within the competency of Congress to declare that stout is not a medicinal agent—that is for the courts to determine. The general rule is thus stated in *Block v. Hirsch*, 256 U. S. 136, 65 L. ed. 865:

No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the courts.

Other cases stating the rule in its application to various situations are as follows:

In *Shoemaker v. United States*, 147 U. S. 282, 37 L. ed. 170, the court said:

The adjudicated cases likewise establish the proposition that while the courts have power to determine whether the use for which private property is authorized by the legislature to be taken, is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted; that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made.

In *Producers Transportation Co. v. Railroad Comm.*, 251 U. S. 228, 64 L. ed. 239, the court said:

It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts, and never was devoted by its owner to public use, that is, to carrying for the public, the state could not, by mere legislative fiat or by any regulating order of a commission, convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the 14th Amendment. Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 593, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; Northern P. R. Co. v. North Dakota, 236 U. S. 585, 595, 59 L. ed. 735, 741, L. R. A. 1917F, 1148, P. U. R. 1915C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916A, 1; Associated Oil Co. v. Railroad Commission, 176 Cal. 518, 523, 526, L. R. A. 1918C, 849, P. U. R. 1918B, 633, 169 Pac. 62. And see Munn v. Illinois, 94 U. S. 113, 126, 24 L. ed. 77, 84; Louisville & N. R. Co. v. West Coast Naval Stores Co., 198 U. S. 483, 495, 49 L. ed. 1135, 1139, 25 Sup. Ct. Rep. 745; Weems S. B. Co. v. People's S. B. Co., 214 U. S. 345, 357, 53 L. ed. 1024, 1029, 29 Sup. Ct. Rep. 661, 16 Ann. Cas. 1222; Chicago & N. W. R. Co. v. Oehs, 249 U. S. 416, 419, 420, 63 L. ed. 679, 682, 683, P. U. R. 1919D, 498, 39 Sup. Ct. Rep. 343.

In *Monongahela Nav. Co. v. United States*, 148 U. S. 312, the said court (p. 327) :

By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question is judi-

cial. It does not rest with the public taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, and the ascertainment of that is a judicial inquiry.

We earnestly contend, therefore, that the medicinal value of stout as set forth in paragraph VI of complainant's bill, is to be taken as true, for the purpose of this appeal, and that a contrary finding by Congress, if there be one in the Willis-Campbell Act, which we do not admit, in no wise limits or affects this contention. Taking the conceded therapeutic value of stout as a premise, we proceed, in the following pages, to demonstrate, as we believe, that the attempt of Congress in the Willis-Campbell Act to prohibit its sale and use for medicinal purposes was wholly beyond the power of Congress under the Eighteenth Amendment.

## II.

**The grant of power contained in the Eighteenth Amendment is limited by the reservations of the Tenth Amendment. The two amendments effect a division of legislative power over intoxicating liquor, the Congress and State legislatures being vested with concurrent legislative power over intoxicating liquor for beverage purposes, and the legislatures of the several States retaining exclusive legislative power over intoxicating liquor for non-beverage purposes.**

Prior to the Eighteenth Amendment, the regulation of the manufacture and sale of intoxicating liquors was a function of State government. The legislative power

of the States was plenary, and extended to every conceivable form of regulation or prohibition, according to the public policy of each individual State. Congress possessed only the power to regulate the interstate transportation of intoxicating liquors, and even this power had been limited and restricted by the Wilson Act and the Webb-Kenyon Act, which to a corresponding extent increased the legislative authority of the States.

This was the situation to which the Eighteenth Amendment was intended to apply. A re-arrangement of power as between national and state governments over the subject of intoxicating liquor was thereby effected. The manufacture, sale or transportation of intoxicating liquors "for beverage purposes" was prohibited, and Congress and the several States were vested with concurrent power to give effect to this prohibition. Power to regulate or prohibit the sale of intoxicating liquor for non-beverage purposes had always been vested in the legislative authority of the several States, and no attempt was made to transfer or vest this power in the national government. It remained, therefore, undisturbed in the several States. This is the necessary effect of the Tenth Amendment, which reads:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people.

A comprehensive statement of the effect of the Eighteenth Amendment in making a separation of State and Federal power over intoxicating liquor and defining its limitations is contained in the recent case of *United States v. Lanza*, 43 Sup. Ct. 141:

The Amendment was adopted for the purpose of establishing prohibition as a national policy

reaching every part of the United States and affecting transactions which are essentially local or intrastate, as well as those pertaining to interstate or foreign commerce. The second section means that power to take legislative measures to make the policy effective shall exist in Congress in respect of the territorial limits of the United States and at the same time the like power of the several States within their territorial limits shall not cease to exist. Each State, as also Congress, may exercise an independent judgment in selecting and shaping measures to enforce prohibition. Such as are adopted by Congress become laws of the United States and such as are adopted by a State become laws of that State. They may vary in many particulars, including the penalties prescribed, but this is an inseparable incident of independent legislative action in distinct jurisdictions.

To regard the amendment as the source of the power of the States to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the Federal Constitution, chiefly the commerce clause, each State possessed that power in full measure prior to the amendment, and the probable purpose of declaring a concurrent power to be in the States was to negative any possible inference that in vesting the National Government with the power of country-wide prohibition, state power would be excluded. In effect the second section of the Eighteenth Amendment put an end to restrictions upon the State's power arising out of the Federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits. To be sure, the first section of the amendment took from the States all power to authorize acts falling within its prohibition, but it did not cut down or displace prior state laws not inconsistent with it. Such laws derive their force, as do all new ones consistent with

it, not from this amendment, but from power originally belonging to the States, preserved to them by the Tenth Amendment, and now relieved from the restriction heretofore arising out of the Federal Constitution. This is the *ratio decidendi* of our decision in *Vigilotti v. Pennsylvania* (April 10, 1922).

We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

It is always to be borne in mind that by the express language of the Eighteenth Amendment the control over intoxicating liquor conferred on Congress is limited to "beverage purposes." The necessary effect of the Tenth Amendment is to reserve to the several States all power over intoxicating liquor for "non-beverage purposes", and this power is exclusive; the States, and the States alone, may exercise it. It is reserved to the several States to determine whether stout may be sold and used for medicinal purposes. Congress is without any direct legislative power whatsoever over the subject matter.

It is true that Congress in the exercise of a delegated power, such as the power to prohibit the use of intoxicating liquor for beverage purposes, possesses the incidental power to enact such laws and make such regulations as will effectively prevent the manufacture, sale or transportation of intoxicating liquor for the prohibited purposes; but the exercise of this incidental power, it is respectfully contended, must stop short of

the actual prohibition of the manufacture and sale of intoxicating liquor for non-beverage purposes. Otherwise the legislative control of the several States over intoxicating liquor for non-beverage purposes, reserved to them by the Tenth Amendment, would be nullified and set at naught.

The incidental power of Congress to give full effect to a delegated power cannot, consistently with the Tenth Amendment, wholly deprive the States of the power which that amendment reserves to them. In other words, judicial construction cannot write into the Eighteenth Amendment authority to prohibit the manufacture and sale of intoxicating liquor for non-beverage purposes, as well as for beverage purposes. To do so would be to strike the words "for beverage purposes" from the Amendment. Had the amendment when submitted to the legislatures of the several States contained a delegation of authority to Congress to prohibit the manufacture, sale or transportation of intoxicating liquor for non-beverage, as well as beverage purposes, there is no reason to suppose that it would have received the ratification it did.

It is of the utmost importance to bear in mind that the power over the manufacture and sale of intoxicating liquor, similar to the power to regulate state and inter-state commerce, is a *divided* power, a part of this power being vested in the general government and a part being reserved to State governments. The State powers may not encroach upon the power of Congress, nor may the power of Congress encroach upon the State power to the extent of occupying the entire legislative field. The Constitution itself creates a dividing line which neither may cross.

It should also be borne in mind that this is not a case where Congress acts in the exercise of a power covering the entire legislative field, as it did in *Ruppert*

v. Caffey, 251 U. S. 264. There Congress was acting in the exercise of its constitutional war power, and its authority, therefore, covered the entire field, and extended to the prohibition of intoxicating liquor, whether for beverage or non-beverage purposes. Nor is it like the case of *Purity Extract Co. v. Lynch*, 226 U. S. 192, where an act of the legislature of Mississippi prohibiting the sale of malt liquors was upheld. There the State authority was exclusive, covering the entire legislative field, and it could regulate or prohibit as its public policy might require. In neither case was there any constitutional division of power between National and State governments.

It may be contended by the defendants that the incidental power of Congress to carry out and give effect to its power to prohibit the sale of intoxicating liquor for beverage purposes, authorizes it to prohibit absolutely the sale of such liquor for medicinal purposes. We confidently deny this proposition, and state our position and our reasons for it under the following heading.

### III.

**The incidental power possessed by Congress to make effective its power to prohibit the sale of intoxicating liquor for beverage purposes, cannot be constitutionally exercised so as wholly to prohibit its sale for non-beverage purposes.**

The power of Congress to prohibit the sale of intoxicating liquor for beverage purposes, and its incidental power to enact such legislation as may be reasonably calculated to make this power effective, is freely conceded.

Congress may throw safeguards around the sale of liquor for non-beverage purposes so as to prevent its sale for beverage purposes. It may lawfully require dealers in liquor for non-beverage purposes to take out permits and to have all of their sales policed. It may impose reasonable limits upon the quantity of intoxicating liquor to be sold for non-beverage purposes. It may reasonably limit the number of prescriptions for medicinal liquor which may be issued by a physician, or it may, if deemed necessary, limit the issue of prescriptions to designated State or Federal officials.

It is confidently submitted, however, that Congress may not, as is attempted in the Willis-Campbell Act, wholly usurp the conceded legislative function of the States, and altogether prohibit the sale of intoxicating liquor for non-beverage purposes. Reasonable regulations must stop short of absolute prohibition. State legislative power may be infringed upon or incidentally affected, but it can not be entirely appropriated. The words "for beverage purposes" in the Eighteenth Amendment cannot be amended by judicial construction so as to read "for both beverage and non-beverage purposes." The Tenth Amendment stands as an insurmountable barrier against any such attempt. It reads into the Eighteenth Amendment a condition, the substance of which may be expressed as follows:

Provided, however, that the exclusive right to regulate or prohibit the manufacture and sale of intoxicating liquor for non-beverage purposes is hereby reserved to the several States.

There are well-recognized limitations upon the incidental power of Congress to make effective the exercise of its authority under an express or delegated power. Some of the decisions defining these limitations will now be referred to.

The power of Congress over interstate commerce is paramount, and it possesses the incidental power to enact such legislation as to make this power fully effective. Congress sought to invoke this incidental power for the laudable purpose of *prohibiting* the employment of children in mines or factories, and accordingly, on September 1, 1916, passed an act prohibiting the transportation in interstate commerce of the products of mines or factories in which, within thirty days prior to removal, children under the age of 14 years were employed, or children between the ages of 14 and 16 were employed or permitted to work more than eight hours a day or more than six days a week. The Act, however, was held to be invalid (*Hammer v. Dagenhart*, 247 U. S. 251), upon the ground that the incidental power of Congress, thus invoked, could not constitutionally extend to control a subject within the exclusive power of the States. The court said:

The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.

The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution.

Police regulations relating to the internal trade and affairs of the states have been uniformly recognized as within such control. "This," said this court in *United States v. De Witt*, 9 Wall. 41, 45, 19 L. ed. 593, "has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occa-

sions, that we think it unnecessary to enter again upon the discussion." See *Keller v. United States*, 213 U. S. 138, 144, 145, 146, 29 Sup. Ct. 470, 53 L. ed. 737, 16 Ann. Cas. 1066; Cooley's Constitutional Limitations (7th Ed.), p. 11.

\* \* \* \* \*

A statute must be judged by its natural and reasonable effect. *Collins v. New Hampshire*, 171 U. S. 30, 33, 34, 18 Sup. Ct. 768, 43 L. ed. 60. The control by Congress over interstate commerce cannot authorize the exercise of authority not entrusted to it by the Constitution. *Pipe Line case*, 234 U. S. 548, 560, 34 Sup. Ct. 956, 58 L. ed. 1459. The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the nation by the federal Constitution.

In interpreting the Constitution it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved. *Lane County v. Oregon*, 7 Wall. 71 76, 19 L. ed. 101. The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general Government. *New York v. Miln*, 11 Pet. 102, 139, 9 L. ed. 394; *Kidd v. Pearson*, *supra*. To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states.

\* \* \* \* \*

In our view the necessary effect of this Act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities to regulate the hours of labor of children in factories and mines within the states, a purely state authority. Thus the Act in a two-fold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the federal authority does not extend. The far reaching result of upholding the Act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed.

It thus appears that the incidental power of Congress to make effective its general power over interstate commerce is not without its limitations, and that it must stop short of overriding the Tenth Amendment and usurping the powers which that amendment has reserved to the States and to the people.

But the advocates of the Child Labor Law were undismayed by the failure of their efforts to invoke the power of Congress over interstate commerce, and they sought to accomplish the same result by resort to the power of Congress over taxation. The Child Labor Tax Law of February 24, 1919, was the result. It imposed a tax of 10 per cent of the net profits of the year upon an employer who knowingly employed during any portion of the year a child within the age limits therein prescribed. The end sought was to *prohibit* child labor. Here, again, the incidental power of Congress to make

effective its power of taxation was relied upon, but it was held (*Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 66 L. ed. 817), that the Act of Congress was void, in that it was an unconstitutional effort to employ the power of taxation to regulate a subject matter which, under the Tenth Amendment, is exclusively a State function. The court there said:

Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty? \* \* \* In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?

It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not intrusted to Congress, but left or committed by the supreme law of the land to the control of the states. We cannot avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards. In the maintenance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.

The court then refers to the case of *Hammer v. Dagenhart, supra*, saying:

Congress there enacted a law to prohibit transportation in interstate commerce of goods made at a factory in which there was employment of children within the same ages and for the same number of hours a day and days in a week as are penalized by the act in this case. This court held the law in that case to be void. It said:

"In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states,—a purely state authority."

In the case at bar, Congress, in the name of a tax which, on the face of the act, is a penalty, seeks to do the same thing, and the effort must be equally futile.

The analogy of the Dagenhart Case is clear. The congressional power over interstate commerce is, within its proper scope, just as complete and unlimited as the congressional power to tax; and the legislative motive in its exercise is just as free from judicial suspicion and inquiry. Yet when Congress threatened to stop interstate commerce in ordinary and necessary commodities, unobjectionable as subjects of transportation, and to deny the same to the people of a state, in order to coerce them into compliance with Congress's regulation of state concerns, the court said this was not in fact regulation of interstate commerce, but rather that of state concerns, and was invalid. So here the so-called tax is a penalty to coerce people of a state to act as Congress wishes them to act in respect of a matter completely the business of the state government under the Federal Constitution. This case requires, as did the Dagenhart Case, the application of the principle announced by Chief Justice Marshall in *M'Culloch v. Maryland*, 4 Wheat. 316, 423, 4 L. ed. 579, 605, in a much-quoted passage:

"Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

Another recent successful invocation of the Tenth Amendment against the incidental power of Congress to make effective both the interstate commerce and taxation features of the Constitution is found in the decision of this Court in *Hill v. Wallace*, 259 U. S. 44, 75, declaring the Future Trading Act of August 24, 1921, unconstitutional and void. This Act contained a complete regulation of boards of trade, with a so-called tax of 10 cents a bushel on all contracts for the sale of grain for future delivery, imposed by way of penalty to coerce boards of trade and their members into compliance. The court held that the Act was not a lawful exercise by Congress of its power over interstate commerce, or of its power over taxation, but was an unauthorized attempt to regulate the conduct of boards of trade, which was a subject matter over which the States had exclusive jurisdiction. The court said:

The act is in essence and on its face a complete regulation of boards of trade, with a penalty of 20 cents a bushel on all "futures" to coerce boards of trade and their members into compliance. When this purpose is declared in the title to the bill, and is so clear from the effect of the provisions of the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power. The elaborate machinery

for hearings by the Secretary of Agriculture and by the commission of violations of these regulations, with the withdrawal by the commission of the designation of the board as a contract market, and of complaints against persons who violate the act or such regulations, and the imposition upon them of the penalty of requiring all boards of trade to refuse to permit them the usual privileges, only confirm this view.

Our decision, just announced, in *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, *ante*, 817, 21 A. L. R. 1432, 42 Sup. Ct. Rep. 449, involving the constitutional validity of the Child Labor Law, completely covers this case. We there distinguish between cases like *Veazie Bank v. Fenno*, 8 Wall. 553, 19 L. ed. 482, and *McCray v. United States*, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561, in which it was held that this court could not limit the discretion of Congress in the exercise of its constitutional powers to levy taxes because the court might deem the incidence of the tax oppressive or even destructive. It was pointed out that in none of those cases did the law objected to show on its face, as did the Child Labor Tax Law, detailed regulation of a concern or business wholly within the police power of the state, with a heavy exaction to promote the efficacy of such regulation. We there say:

"Out of proper respect for the acts of a co-ordinate branch of the government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax, it was intended to destroy its subject. But in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with,

and which are reserved to them by the 10th Amendment, would be to enact a detailed measure of complete regulation of the subject, and enforce it by a so-called tax upon departure from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress, and completely wipe out the sovereignty of the states."

This has complete application to the act before us, and requires us to hold that the provisions of the act we have been discussing cannot be sustained as an exercise of the taxing power of Congress conferred by sec. 8, article 1.

We come to the question, then, Can these regulations of boards of trade by Congress be sustained under the commerce clause of the Constitution? Such regulations are held to be within the police powers of the state. *House v. Mayes*, 219 U. S. 270, 55 L. ed. 213, 31 Sup. Ct. Rep. 234; *Broadnax v. Missouri*, 219 U. S. 287, 55 L. ed. 219, 31 Sup. Ct. Rep. 238. There is not a word in the act from which it can be gathered that it is confined in its operation to interstate commerce. The words "interstate commerce" are not to be found in any part of the act, from the title to the closing section. The transactions upon which the tax is to be imposed, the bill avers, are sales made between members of the Board of Trade in the city of Chicago, for future delivery of grain, which will be settled by the process of offsetting purchases or by a delivery of warehouse receipts of grain stored in Chicago. Looked at in this aspect, and without any limitation of the application of the tax to interstate commerce, or to that which the Congress may deem, from the evidence before it, to be an obstruction to interstate commerce, we do not find it possible to sustain the validity of the regulations as they are set forth in this act. A reading of the act makes it quite clear that Congress sought to use the taxing power to give validity to the act. It did not have the exercise of its

power under the commerce clause in mind, and so did not introduce into the act the limitations which certainly would accompany and mark an exercise of the power under the latter clause.

The bearing of these decisions upon the case at bar is obvious. They hold that manufacturing and mining and the employment of child labor or other labor therein, the conduct of boards of trade and the carrying on of business thereat, are within the exclusive police power of the States, reserved to them under the Tenth Amendment. These powers cannot be successfully invaded or usurped by Congress through the exercise of its power over interstate commerce or over taxation, nor under the implied powers which Congress possesses to enact legislation to make these powers effective. So it is with the sale of intoxicating liquor for non-beverage purposes. The right to control this subject matter has been exclusively reserved to the several States. While it may be incidentally affected by proper Congressional action, it cannot be wholly destroyed. It is obvious that the exclusive authority of the several States over intoxicating liquor for medicinal purposes, or liquor for sacramental or other non-beverage purposes, can not be controlled indirectly through the imposition of a prohibitive tax upon dealers in such non-beverage liquor, or on physicians who prescribe it. If such control can not be exercised indirectly, by what process of reasoning can its direct exercise, as attempted in the Willis-Campbell Act, be justified?

The Federal Constitution draws a line of demarcation between the control of interstate commerce by Congress and the control of intrastate commerce by the several States, each of which is supreme within its sphere of legislative action. Congress can no more strike down or prohibit intrastate commerce than the States can inval-

date congressional regulation of interstate commerce. The Constitution has drawn a similar line of demarcation between the power of Congress over liquor for beverage purposes, and the power of the States over liquor for non-beverage purposes. Neither government can successfully invade the legislative domain of the other.

These observations find ample support in the first Employers Liability case (*Howard v. Illinois Central*, 207 U. S. 462), where the court held invalid an Act of Congress applying to all employees of carriers engaged in interstate commerce, for the reason that Congress had no power to legislate with reference to employees who were engaged in strictly intrastate commerce. The court said:

The act, then, being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce. Without stopping to consider the numerous instances where, although a common carrier is engaged in interstate commerce, such carrier may, in the nature of things, also transact no interstate commerce, although such local business may indirectly be related to interstate commerce, a few illustrations showing the operation of the statute as to matters wholly independent of interstate commerce will serve to make clear the extent of the power which is exerted by the statute. Take a railroad engaged in interstate commerce, having a purely local branch operated wholly within a state. Take again the same road having shops for repairs, and, it may be, for construction work, as well as a large accounting and clerical force, and having, it may be, storage elevators and warehouses, not to suggest, besides, the possibility of

its being engaged in other independent enterprises. Take a telegraph company engaged in the transmission of interstate and local messages. Take an express company engaged in local as well as in interstate business. Take a trolley line moving wholly within a state as to a large part of its business, and yet, as to the remainder, crossing the state line.

As the act thus includes many subjects wholly beyond the power to regulate commerce, and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution, and cannot be enforced unless there be merit in the propositions advanced to show that the statute may be saved.

It was sought to sustain the constitutionality of the Act by contending that a carrier by engaging in interstate commerce thereby submitted itself to the regulatory power of Congress, and that this included the power to regulate the liability of the carrier to its employees, although such employee was engaged in intrastate commerce. This contention was denied by the court, using the following language:

It remains only to consider the contention which we have previously quoted, that the act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that, because one engages in interstate commerce, he thereby endows Congress with power not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve,

since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable matters which, from the beginning, have been, and must continue to be, under their control so long as the Constitution endures.

The Tenth Amendment, which, we contend, reserves to the several States the power to regulate or prohibit the sale of intoxicating liquor for non-beverage purposes, is a limitation imposed by the Constitution upon the action of Congress, and this limitation should receive a liberal, and not a narrow construction. In support of this rule we invoke the decision of this court in *Fairbank v. United States*, 181 U. S. 283. There the validity of the stamp tax imposed on foreign bills of lading by Act of Congress was under consideration. Section 8, Article 1, of the Constitution gave Congress power "to lay and collect taxes, duties, imposts and excises." One of the limitations contained in the Constitution was that "no tax or duty shall be laid on any articles exported from any State." The court held that the limitation must be liberally construed, and that its effect was to deprive Congress of the power to impose the tax in question. It said:

We are not here confronted with a question of the extent of the powers of Congress, but one of the limitations imposed by the Constitution on its action, and it seems to us clear that the same rule

and spirit of construction must also be recognized. If powers granted are to be taken as broadly granted, and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition of limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed, and that language of restriction is to be narrowly and technically construed. Especially is this true when in respect to grants of powers there is, as heretofore noticed, the help found in the last clause of the 8th section, and no such helping clause in respect to prohibitions and limitations. The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose.

The requirement of the Constitution is that exports should be free from any governmental burden. The language is, "no tax or duty." Whether such provision is or is not wise is a question of policy with which the courts have nothing to do. We know historically that it was one of the compromises which entered into and made possible the adoption of the Constitution. It is a restriction on the power of Congress; and as, in accordance with the rules heretofore noticed, the grants of powers should be so construed as to give full efficacy to those powers and enable Congress to use such means as it deems necessary to carry them into effect, so in like manner a restriction should be enforced in accordance with its letter and spirit, and no legislation can be tolerated which, although it may not conflict with the letter,

destroys the spirit and purpose of the restriction imposed. If, for instance, Congress may place a stamp duty of 10 cents on bills of lading of goods to be exported, it is because it has power to do so; and if it has power to impose this amount of stamp duty it has like power to impose any sum in the way of stamp duty which it sees fit. And it needs but a moment's reflection to show that thereby it can as effectually place a burden upon exports as though it placed a tax directly upon the articles exported. It can, for the purpose of revenue, receive just as much as though it placed a duty directly upon the articles, and it can just as fully restrict the free exportation which was one of the purposes of the Constitution.

It is pointed out that if the first clause of sec. 8 of art. 1 were the only constitutional provision upon the subject, no doubt would be entertained that the act of Congress in question would be upheld; saying (pp. 295, 296):

The first clause of sec. 8 of article 1 of the Constitution gives to Congress "power to lay and collect taxes, duties, imposts, and excises." Were this the only constitutional provision in respect to the matter of taxation, there would be no doubt that, tried by the settled rules of constitutional interpretation, Congress would have full power and full discretion as to both objects and modes of taxation. But there are also expressed in the same instrument three limitations. As said by Chief Justice Chase, in the License Tax Cases, 5 Wall. 462, 471, 18 L. ed. 497, 500:

"It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion."

The court then refers to *Monongahela Nav. Co. v. United States*, 148 U. S. 312, saying (p. 300) :

In *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622, it appeared that Congress had passed an act authorizing the condemnation of a lock and dam known as the upper lock and dam on the Monongahela river, belonging to the navigation company, with a proviso "that in estimating the sum to be paid by the United States the franchise of said corporation to collect tolls shall not be considered or estimated;" the idea being that simply the value of the tangible property was all that need be paid for; and it was held that such proviso could not be sustained; that while the right of condemnation was clear, it was limited by the clause in the 5th Amendment, "nor shall private property be taken for public use without just compensation," and that that language required payment of the entire value of the property of which the owner was deprived; \* \* \*.

In short, the court held in that case that Congress could not by any declaration in its statute avoid, qualify, or limit the special restriction placed upon its power, but that it must be enforced according to its letter and spirit and to the full extent.

The court next cites *Boyd v. United States*, 116 U. S. 616, saying (p. 301, 302) :

In *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, the 5th section of the act of June 22, 1874 (18 Stat. at L. 186, chap. 391), which authorized a court of the United States in revenue cases, on motion of the district attorney, to require the defendant or the claimant to produce in court his private books, invoices, and papers, or else that the allegations of the attorney as to their contents should be taken as confessed,

was held unconstitutional and void as applied to an action for penalties or to establish a forfeiture of the party's goods, because repugnant to the 4th and 5th Amendments to the Constitution. The case is significant, for the statute was not so much in conflict with the letter as with the spirit of the restrictive clauses of those Amendments; \* \* \*

It is next pointed out by the court that the construction which Congress had placed upon these constitutional provisions in enacting revenue statutes in the past was of no consequence where the language was plain, since the construction of constitutional provisions is not for Congress but for the courts, saying:

From this *resumé* of our decisions it clearly appears that practical construction is relied upon only in cases of doubt. We have referred to it when the construction seemed to be demonstrable, but then only in response to doubts suggested by counsel. Where there was obviously a matter of doubt, we have yielded assent to the construction placed by those having actual charge of the execution of the statute, but where there was no doubt we have steadfastly declined to recognize any force in practical construction. Thus, before any appeal can be made to practical construction, it must appear that the true meaning is doubtful.

We have no disposition to belittle the significance of this matter. It is always entitled to careful consideration, and in doubtful cases will, as we have shown, often turn the scale; but when the meaning and scope of a constitutional provision are clear it cannot be overthrown by legislative action, although several times repeated and never before challenged. It will be perceived that these stamp duties have been in force during only three periods: First, from 1797 to 1802; second, from 1862 to 1872; and, third, commencing with the re-

cent statute of 1898. It must be borne in mind also in respect to this matter, that during the first period exports were limited and the amount of the stamp duty was small, and that during the second period we were passing through the stress of a great civil war, or endeavoring to carry its enormous debt; so that it is not strange that the legislative action in this respect passed unchallenged. Indeed, it is only of late years, when the burdens of taxation are increasing by reason of the great expenses of government, that the objects and modes of taxation have become a matter of special scrutiny. But the delay in presenting these questions is no excuse for not giving them full consideration and determining them in accordance with the true meaning of the Constitution.

The incidental power of Congress to enact legislation to make effective the exercise of its power over interstate commerce must be reasonably exercised, and does not extend to matters having no direct or immediate connection with such commerce. Thus, in *Adair v. United States*, 208 U. S. 161, it was held that there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress, by the Act of June 1, 1898, sec. 10, to make it a crime against the United States for an agent or officer of an interstate carrier, having full authority in the premises from his principal, to discharge an employee from service to such carrier because of such membership in a labor organization. The court said:

Will it be said that the provision in question had its origin in the apprehension, on the part of Congress, that, if it did not show more consideration for members of labor organizations, or if it did not insert in the statute some such provision as the one here in question, members of labor or-

ganizations would, by illegal or violent measures, interrupt or impair the freedom of commerce among the states? We will not indulge in any such conjectures, nor make them, in whole or in part, the basis of our decision. We could not do so consistently with the respect due to a coordinate department of the government. We could not do so without imputing to Congress the purpose to accord to one class of wage-earners privileges withheld from another class of wage-earners, engaged, it may be, in the same kind of labor and serving the same employer. Nor will we assume, in our consideration of this case, that members of labor organizations will, in any considerable numbers, resort to illegal methods for accomplishing any particular object they have in view.

Looking alone at the words of the statute for the purpose of ascertaining its scope and effect, and of determining its validity, we hold that there is not such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employee because of such membership on his part. If such a power exists in Congress it is difficult to perceive why it might not, by absolute regulation, require interstate carriers, under penalties, to employ, in the conduct of its interstate business, *only* members of labor organizations, or *only* those who are *not* members of such organizations,—a power which could not be recognized as existing under the Constitution of the United States. No such rule of criminal liability as that to which we have referred can be regarded as, in any just sense, a regulation of interstate commerce. We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right se-

cured by other provisions of the Constitution. *Gibbons v. Ogden*, 9 Wheat. 1, 196, 6 L. ed. 23, 70; *Lottery Case* (*Champion v. Ames*), 188 U. S. 321, 353, 47 L. ed. 492, 500, 23 Sup. Ct. Rep. 321.

It results, on the whole case, that the provision of the statute under which the defendant was convicted must be held to be repugnant to the 5th Amendment, and as not embraced by nor within the power of Congress to regulate interstate commerce, but, under the guise of regulating interstate commerce, and as applied to this case, it arbitrarily sanctions an illegal invasion of the personal liberty as well as the right of property of the defendant Adair.

Much less can an incidental or implied power of Congress be extended to and exerted upon a subject matter which has been placed by the Constitution in the exclusive control of the legislative power of the several States.

Another case where an unsuccessful effort was made to extend the incidental power of Congress over a subject matter within the exclusive jurisdiction of the States is *United States v. De Witt*, 9 Wall. 41. There the court held invalid the Act of Congress of March 2, 1867, which made it a misdemeanor to mix for sale naphtha and illuminating oils, or to sell or offer such mixture for sale, or to sell or offer for sale oil made of petroleum for illuminating purposes, inflammable at a less temperature than 110 degrees Fahrenheit. It was sought to sustain the Act on the ground that it was "in aid and support of the internal revenue tax imposed on other illuminating oils." The court said:

That Congress has power to regulate commerce with foreign nations and among the several states, and with the Indian tribes, the Constitution expressly declares. But this express grant of power to regulate commerce among the states has al-

ways been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate states; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.

It has been urged in argument that the provision under which this indictment was framed is within this exception; that the prohibition of the sale of illuminating oil described in the indictment was in aid and support of the internal revenue tax imposed on other illuminating oils. And we have been referred to provisions, supposed to be analogous, regulating the business of distilling liquors, and the mode of packing various manufactured articles; but the analogy appears to fail at the essential point, for the regulations referred to are restricted to the very articles which are the subject of taxation, and are plainly adapted to secure the collection of the tax imposed; while, in the case before us, no tax is imposed on the oils, the sale of which is prohibited. If the prohibition, therefore, has any relation to taxation at all, it is merely that of increasing the production and sale of other oils and, consequently, the revenue derived from them, by excluding from the market the particular kind described.

This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes.

There is, indeed, no reason for saying that it was regarded by Congress as such a means, except that it is found in an Act imposing internal duties. Standing by itself, it is plainly a regulation of police; and that it was so considered, if not by the Congress which enacted it, certainly by the succeeding Congress may be inferred from the circumstances, that while all special taxes on illuminating oils were repealed by the Act of July

20, 1868, which subjected distillers and refiners to the tax on sales as manufacturers, this prohibition was left unrepealed.

As a police regulation, relating exclusively to the internal trade of the states, it can only have effect where the legislative authority of Congress excludes, territorially, all state legislation, as, for example, in the District of Columbia. Within state limits, it can have no constitutional operation. This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions (*License Cases*, 5 How. 504; *Passenger cases*, 7 How. 282; *License Tax cases*, 5 Wall. 470 (72 U. S. XVIII, 500, and the cases cited) that we think it unnecessary to enter again upon the discussion.

In *Buffington v. Day*, 11 Wall. 113, it was sought to extend the taxing power of Congress to the imposition of a tax upon the salary of a judicial officer of a State. The effort, however, was unsuccessful, because, under the Tenth Amendment, "the state is as sovereign and independent as the general government." The court said:

It is a familiar rule of construction of the Constitution of the Union that the sovereign powers vested in the State governments by their constitutions remained unaltered and unimpaired except so far as they were granted to the Government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: "The powers not delegated to the United States are reserved to the states respectively, or to the people." The Government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be

such as are expressly given, or given by necessary implication.

The general government and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former, in its appropriate sphere, is supreme; but the states within the limits of their powers not granted, or, in the language of the Tenth Amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the states.

In *Keller v. United States*, 213 U. S. 138, it was held that the Act of Congress of February 20, 1907, providing for the criminal punishment of the mere keeping, maintaining, supporting, or harboring, for the purpose of prostitution, any alien woman within three years after she shall have entered the United States, was unconstitutional and void. It was sought to sustain the Act as a part of "the general power which exists in the nation to control the coming in or removal of aliens." It was held, however, that the subject matter of the statute was a part of the reserved police power of the State, which could not be invaded by the incidental power of Congress which the Government had invoked. The court said (p. 144):

It is unnecessary to determine how far Congress may go in legislating with respect to the conduct of an alien while residing here, for there is no charge against one; nor to prescribe the extent of its power in punishing wrongs done to an alien, for there is neither charge nor proof of any such wrong. So far as the statute or the indictment requires, or the testimony shows, she was voluntarily living the life of a prostitute, and was only furnished a place by the defendants to follow

her degraded life. While the keeping of a house of ill-fame is offensive to the moral sense, yet that fact must not close the eye to the question whether the power to punish therefor is delegated to Congress or is reserved to the state. Jurisdiction over such an offense comes within the accepted definition of the police power. Speaking generally, that power is reserved to the states, for there is in the Constitution no grant thereof to Congress.

The beneficent purposes to be accomplished by the Tenth Amendment, as well as the liberal construction which should be accorded to it, are forcefully expressed in *Kansas v. Colorado*, 206 U. S. 46, where it is said:

This amendment, which was seemingly adopted with prescience of just such contentions as the present, disclosed the widespread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that Act. It reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The argument of counsel ignores the principal factor in this article, to wit, "the people." Its principal purpose was not the distribution of power between the United States and the states, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it, "we, the people of the United States," not the people of one state, but the people of all the states; and Article 10 reserves to the people of all the states the powers not delegated to the United States. The powers affecting the internal affairs of the

states not granted to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, and all powers of a national character which are not delegated to the national government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and, after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article 10 is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning.

It remains to consider the limitations which the Tenth Amendment imposes upon the incidental power of Congress to enact legislation to carry into effect its delegated powers; or, as applied to this case, what are the limitations upon the power of Congress in making effective the prohibition of intoxicating liquor for beverage purposes? Certain it is that Congress may go no further than is reasonably necessary to put an end to traffic in intoxicating liquor for beverage purposes. It may adopt such safeguards as are reasonably necessary to prevent intoxicating liquor from coming into public use, for the prohibited purposes. To that extent, and to that extent only, may it encroach upon the reserved legislative powers of the several States. That this is the extreme limit to which Congress may go is apparent from a consideration of the recent case of *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, where the court sustained the validity of an

order made by the Interstate Commerce Commission requiring intrastate rates to be raised to a level with new interstate rates promulgated by the Commission. It was pointed out that the Transportation Act placed the affirmative duty upon the Commission to establish rates which would yield to railway companies in the country a specified return, and that this mandate of Congress could not be made effective unless the intrastate rates should be raised to a corresponding level. The court held that commerce is a unit, and that when interstate and intra-state commerce are so mingled together that the supreme authority of the nation cannot exercise complete, effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation may be exercised, and it is not an invasion of State authority. Even in such a case the State authority over intrastate rates can be only incidentally affected. It can not be nullified, nor abrogated, nor can Congress draw to itself control over that which the Constitution has left to the States. The court was careful to preserve to the States the "general regulation of intrastate commerce," saying:

It is said that our conclusions gives the Commission unified control of interstate and intra-state commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intra-state commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Com-

mission has found to be fair to interstate commerce.

If the Willis-Campbell Act affected the sale of non-beverage liquor incidentally, and left to the States its "general regulation," we would have no ground for complaint. The National Prohibition Act went to the extreme limit in the so-called incidental regulation of non-beverage liquor. The Willis-Campbell Act, not content with the so-called incidental regulation contained in the former act, undertakes, in express terms, absolutely to prohibit the use of all malt liquors for non-beverage purposes, thus denying to the several States all power of "general regulation" of any kind whatsoever.

The effect of the Eighteenth and Tenth Amendments, considered together, is to vest in the several States the power to regulate or prohibit the use of malt liquors for non-beverage purposes. The effect of the Willis-Campbell Act, if valid, is to divest the States of every shred of authority over the subject. It is plain, therefore, that Congress has transcended its constitutional authority; it has passed the limit of incidental regulation and undertaken to usurp the rightful functions of the several States. The Supreme Court, in *Rhode Island v. Palmer*, 253 U. S. 350, recognizes "that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement." Those limits have been clearly transgressed in the present instance.

## IV.

**The enforcement of the Willis-Campbell Act will deprive the appellant of its property without due process of law, and take its property for public use without just compensation, in violation of the Fifth Amendment.**

It is contended that the Willis-Campbell Act is invalidated by the Fifth Amendment, for two reasons: First, because the action of Congress in prohibiting the use of Guinness's Stout for medicinal purposes, while permitting the use for such purposes of all vinous and spirituous liquors, is arbitrary, capricious and unreasonable; and, secondly, because the National Prohibition Act, which permitted the use of Guinness's Stout for medicinal purposes, was declarative of a national policy to that effect, and amounted to an assurance to the complainant that its stock then on hand could thereafter lawfully be disposed of for that purpose, whereas the Willis-Campbell Act, subsequently passed, immediately prohibited the further sale and use of said stock, and thereby undertook to take or confiscate the appellant's property for public use without just compensation. These will be considered in their order.

The due process clause of the Fifth Amendment is given precisely the same construction as the due-process clause of the Fourteenth Amendment. No precise definition of this phrase has been attempted by the courts; its application has been determined by a process of inclusion and exclusion.

The recent case of *Chicago & Northwestern Ry. v. Nye Schneider Fowler Co.*, 43 Sup. Ct. 55, gives a broad and comprehensive interpretation of the due process clause

and equal protection clause of the Fourteenth Amendment, holding that statutes which "violate the rudiments of fair play" or which "work an arbitrary, unequal and oppressive result which shocks the sense of fairness" are void. It is there said:

But it is also apparent from these cases that such penalties or fees must be moderate and reasonably sufficient to accomplish their legitimate object and that the imposition of penalties or conditions that are plainly arbitrary and oppressive and "violate the rudiments of fair play" insisted on in the Fourteenth Amendment, will be held to infringe it. \* \* \* The Court has not intended to establish one, but only to follow the general rule that when in their actual operation in the cases before it, such statutes work an arbitrary, unequal and oppressive result for the carrier which shocks the sense of fairness the Fourteenth Amendment was intended to satisfy in respect to state legislation, they will not be sustained. \* \* \* Thus what we have here is a requirement that the carrier shall pay the attorneys of the claimant full compensation for their labors in resisting its successful effort on appeal to reduce an unjust and excessive claim against it. This we do not think is fair play.

In *Truax v. Corrigan*, 257 U. S. 312, 332, the court said (p. 332):

The due process clause brought down from Magna Charta was found in the early state constitutions and later in the 5th Amendment to the Federal Constitution as a limitation upon the executive, legislative, and judicial powers of the Federal government, while the equality clause does not appear in the 5th Amendment, and so does not apply to congressional legislation. The due process clause requires that every man shall have the protection of his day in court, and the benefit

of the general law,—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. *Hurtado v. California*, 110 U. S. 516, 535, 28 L. ed. 232, 238, 4 Sup. Ct. Rep. 111, 292. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty, and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law. "All men are equal before the law;" "This is a government of laws, and not of men;" "No man is above the law,"—are all maxims showing the spirit in which legislatures, executives, and courts are expected to make, execute, and apply laws. But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.

It has been held that the words "due process of law" and "law of the land" express the same thought and have the same meaning. In *Davidson v. New Orleans*, 96 U. S. 97, Mr. Justice Miller said:

The equivalent of the phrase "due process of law," according to Lord Coke, is found in the words "law of the land," in the Great Charter, in connection with the writ of habeas corpus, the trial by jury, and other guaranties of the rights of the subject against the oppression of the crown.

And in *Missouri Pacific R. Co. v. Humes*, 115 U. S. 513, Mr. Justice Field said:

In England the requirement of due process of law, in cases where life, liberty and property were affected, was originally designed to secure the subject against the arbitrary action of the crown, and to place him under the protection of the law. The words were held to be the equivalent of "law of the land." And a similar purpose must be ascribed to them when applied to a legislative body in this country; that is, that they are intended, in addition to other guaranties of private rights, to give increased security against the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property.

Judge (afterward Justice) Jackson, in *Scott v. City of Toledo*, 36 Federal 385, 393, citing Cooley, Const. Lim. 432, said:

In a general sense, "due process of law" is identical in meaning with the phrase, "law of the land," as used in the constitutions of the several states.

As above stated, the words "due process of law" must have the same meaning in the Fifth and Fourteenth Amendments. This has been so stated in *Hurtado v. California*, 110 U. S. 516. There the court had before it the question whether or not a statute of California, authorizing prosecutions for felonies by information, without indictment by a grand jury, was repugnant to the "due process" clause of the Fourteenth Amendment, and after comparing the two amendments, calling attention to the provision for indictment by a grand jury in the Fifth Amendment, said:

The nature and obvious inference is that in the sense of the Constitution, "due process of law" was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case. The conclusion is equally irre-

sistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of he states, it was used in the same sense with no greater extent.

This court has repeatedly been called upon to decide whether certain classifications in state statutes were reasonable or arbitrary, and whether they were in conflict with the Fourteenth Amendment. In *Caldwell v. Texas*, 137 U. S. 692, 697, the court had before it the validity of a state statute under this amendment, and it said:

By the Fourteenth Amendment the powers of the states in dealing with crime within their borders are not limited, but no state can deprive particular persons or classes of persons of equal and impartial justice under the law. Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the state, the constitutional requisition is satisfied. 2 Kent, Comm. 13. And due process is so secured by laws operating on all alike and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. *Bank of Columbia v. Okely*, 4 Wheat. 235, 244.

In *Leeper v. Texas*, 139 U. S. 462, with the like question before it, the court said:

It must be regarded as settled \* \* \* that by the Fourteenth Amendment the powers of states in dealing with crime within their borders are not limited, except that no state can deprive particular persons, or classes of persons, of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured

by the law of the state the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice. *Hurtado v. California*, 110 U. S. 516, 535, and cases cited.

And in *Giozza v. Tiernan*, 148 U. S. 657, this court said again:

Due Process of Law, within the meaning of the amendment, is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.

McGEHEE on Due Process of Law, p. 60, says:

Purely arbitrary decrees or enactments of the Legislature directed against individuals or classes are held not to be "the law of the land", or to conform to "due process of law."

And WILLOUGHBY on the Constitution, pp. 873, 874, says:

The United States is not by the Constitution expressly forbidden to deny to any one the equal protection of the laws, as are the states by the first section of the Fourteenth Amendment. It would seem, however, that the broad interpretation which the prohibition as to "due process of law" has received is sufficient to cover very many of the acts which, if committed by the states, might be attacked as denying equal protection. Thus it has been repeatedly declared that enactments of a Legislature directed against particular individuals or corporations, or classes of such, without any reasonable ground for selecting them out of the general mass of individuals or corporations, amounts to a denial of due process of law so far

as their life, liberty or property is affected. One of the requirements of due process of law, as stated by the Supreme Court, is that the laws "operate on all alike," and do not subject the individual to an arbitrary exercise of the powers of government.

The Willis-Campbell Act, therefore, under well-recognized rules of law, cannot subject the appellant to the operations of a statute which "violates the rudiments of fair play" or which in its result is "arbitrary, unequal or oppressive." The Act, we contend, violates this constitutional limitation. It arbitrarily and unreasonably singles out malt liquors and prohibits their use for medicinal purposes, while, at the same time, expressly authorizing the use for such purposes of the innumerable forms of vinous and spirituous liquors of greater alcoholic content and offering much greater facility for illegal sale and distribution for beverage purposes. To be valid, this discrimination against malt liquors must rest upon some reasonable relation to the object sought to be accomplished, which is prohibition of the manufacture and sale of *all* intoxicating liquors for beverage purposes. If vinous and spirituous liquors may be used for non-beverage purposes, no reason is perceived why the same rule should not be applied to malt liquors.

Secondly, it is contended that the Willis-Campbell Act, if valid, takes the appellant's property for public use without just compensation. This contention is based upon the following considerations. At the time of the passage of the National Prohibition Act, which permitted the sale of malt liquors for medicinal purposes, the appellant had on hand a large stock of Guinness's Stout. The Act itself was assumed to be declarative of the permanent public policy of the Government under the

Eighteenth Amendment. That Amendment, this court has said, created a revolution in our national attitude toward intoxicating beverages, and the terms of the revolution were assumed to be expressed in the Act. Appellant therefore felt, and, we submit, was justified in feeling, that, consistently with the newly declared public policy, it would be permitted to dispose of its property for medicinal use, and it was taking steps to do so when the Willis-Campbell Act was passed. That Act made no provision for compensating the appellant for the loss which it would sustain from its enforcement, nor did it postpone the effective date of the Act for a period during which the appellant might dispose of its stock. Immediately upon its passage it was approved, and at once became effective.

The appellant contends that the immediate prohibition of the sale of Guinness's Stout, under the circumstances recited above, can be legally effected only provided compensation is made. This question, as is stated in *Ruppert v. Caffey*, 251 U. S. 264, was at that time an open one, on which the court had expressed no opinion. It is, however, there intimated that a State enactment of this character had been sustained in *Mugler v. Kansas*, 123 U. S. 623, 637. In that case, however, a constitutional amendment had been adopted, effective November 2, 1880, and the act under consideration was approved February 19, 1881, to take effect May 1, 1881. The constitutional amendment was a warning, and six months intervened in which the interested parties could set their house in order. No opportunity of this nature was afforded the appellant after the passage of the Willis-Campbell Act, nor did it receive any previous warning.

It was further claimed by the complainant in *Ruppert v. Caffey, supra*, that the act there under consideration was particularly oppressive in respect to beer on hand

at the time it took effect, because the complainant was engaged in manufacturing and selling non-intoxicating beverages expressly authorized by the President in his proclamation of December 8, 1917. The claim was denied, on the ground that no express authorization by the President had been shown.

In the case at bar, however, it can not be denied that the National Prohibition Act permitted the sale by the appellant of its Guinness's Stout for medicinal purposes, and that the Willis-Campbell Act became effective immediately upon its passage and approval, and thereby made illegal what the prior Act had permitted and made lawful. This, we contend, amounts to a taking of appellant's property for public use without just compensation.

**For the foregoing reasons we earnestly contend that the lower court erred in dismissing the complainant's bill and that its decree should be reversed.**

Respectfully submitted,

SAMUEL W. MOORE,  
MARCUS L. BELL,  
Solicitors for Appellant.

25 Broad St.,  
New York, N. Y.,

November 13, 1923.

# INDEX.

	Page.
Status.....	1
Statement.....	2
The issues.....	3
Argument:	
I. The bill.....	5
II. Power of Congress under the Tenth Amendment.....	7
(a) Argument based on erroneous assumption.....	9
(b) Safeguards suggested by appellant found inadequate.....	9
(c) Congress not restricted to regulation if absolute prohibition necessary.....	10
(d) Power of Congress to legislatively determine therapeutic value of malt liquors.....	14
(e) Internal affairs of States only incidentally and indirectly affected.....	19
(f) Conflicting State laws subordinate to paramount law of Congress.....	20
III. The Act not invalidated by the Fifth Amendment.....	21
Conclusion.....	24

## CASES CITED.

<i>Atlantic Coast Line v. Georgia</i> , 234 U. S. 280.....	16
<i>Armour &amp; Co. v. North Dakota</i> , 240 U. S. 510.....	16, 17
<i>Clark Distilling Co. v. Western Md. Ry. Co.</i> , 242 U. S. 311.....	12
<i>Crane v. Campbell</i> , 245 U. S. 304.....	23
<i>Eubank v. Richmond</i> , 226 U. S. 137.....	20
<i>Flaherty v. Hanson</i> , 215 U. S. 515.....	20, 21
<i>Hamilton v. Kentucky Distilleries Co.</i> , 251 U. S. 146.....	24
<i>Hebe v. Shaw</i> , 248 U. S. 297.....	16, 19
<i>Hoke v. United States</i> , 227 U. S. 308.....	8
<i>Jacobson v. Massachusetts</i> , 197 U. S. 11.....	20, 21
<i>Leisy v. Hardin</i> , 135 U. S. 100.....	20
<i>Lottery Case</i> , 188 U. S. 321.....	11
<i>McCulloch v. Maryland</i> , 4 Wheat. 315.....	8
<i>Minnesota Rate Cases</i> , 230 U. S. 352.....	20
<i>Mugler v. Kansas</i> , 123 U. S. 623.....	23, 24
<i>Piel Brothers v. Day</i> , 278 Fed. 223.....	2
<i>Price v. Illinois</i> , 238 U. S. 446.....	16, 18
<i>Purity Extract Co. v. Lynch</i> , 266 U. S. 192.....	8, 16
<i>Rast v. Van Deman</i> , 240 U. S. 342.....	16
<i>Ruppert v. Caffey</i> , 251 U. S. 264.....	8, 13, 15, 24
<i>Southern Ry. Co. v. United States</i> , 222 U. S. 20.....	20
<i>State v. Durein</i> , 70 Kans. 1.....	12
<i>State v. Kane</i> , 15 R. I. 395.....	12
<i>State v. Macek</i> , 104 Kans. 742.....	12
<i>United States v. Doremus</i> , 249 U. S. 86.....	20
<i>Wisconsin R. R. Com. v. C. B. &amp; Q. R. R. Co.</i> , 257 U. S. 563.....	20



# In the Supreme Court of the United States.

OCTOBER TERM, 1923.

EDWARD AND JOHN BURKE (LIMITED),  
Appellant,  
*v.*  
DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, et al. } No. 245.

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.*

## BRIEF FOR THE APPELLEES.

### STATUS.

This suit, one of several brought to test the constitutionality of the Willis-Campbell Act (Chap. 134, 42 Stat. 222), was filed in the District Court for the Southern District of New York to enjoin the prohibition enforcement officers from interfering with the importation, sale, and distribution for medicinal purposes of an intoxicating liquor known as Guinness's Stout, upon the ground that said Act, and the regulations made pursuant thereto, are unconstitutional and void, in so far as they prohibit the importation, sale, purchase, and use of said stout for medicinal purposes.

The case came before Judge Knox on appellant's motion for a preliminary injunction and appellees' motion to dismiss. The motion for a preliminary injunction was denied and the motion to dismiss granted in a memorandum opinion based upon the ruling of Judge Garvin in *Piel Brothers v. Day*, 278 Fed. 223, affirmed in 281 Fed. 1022. (R. 9-10.) The case is here on direct appeal.

**STATEMENT.**

Appellant Edward and John Burke (Limited), a subsidiary of an English corporation located at Dublin, Ireland, is a New York corporation and has its principal place of business in New York City. For many years prior to the enactment of the Willis-Campbell Act appellant and its predecessor, as a branch of the English corporation, were extensively engaged in the importation, sale, and distribution throughout the United States to wholesale druggists, grocers, and others of Guinness's Stout for medicinal and beverage purposes. Upon the passage of said Act, in 1921, the prohibition officers refused to issue to appellant a permit to sell, and to pharmacists and physicians, respectively, permits to purchase and prescribe, said stout for medicinal purposes.

Alleging that such refusal will result in the destruction of a valuable property right and that the Willis-Campbell Act, in so far as it prohibits the prescribing of appellant's stout for medicinal purposes, is unconstitutional and void, because an unauthorized and unlawful attempt by Congress to

legislate over a subject matter reserved to the States by the Tenth Amendment, and because said Act deprives it of its property without due process of law and takes its property for public use without just compensation in violation of the Fifth Amendment, appellant brought this suit to enjoin the appellees from enforcing the provisions of the Act by declining to issue permits to appellant, pharmacists, and physicians, respectively, for the sale, purchase, and prescription of appellant's product for medicinal purposes. The bill was dismissed, as above stated.

#### **THE ISSUES.**

Appellant's main contention is that while the Eighteenth Amendment has given Congress power to prohibit the manufacture, sale, and transportation of intoxicating liquor for beverage purposes, the power to permit, regulate, or prohibit the use of intoxicating liquor for nonbeverage purposes has been reserved to the States by the Tenth Amendment; that while Congress possesses the incidental power to impose regulations upon the manufacture, sale, and transportation of nonbeverage liquor so far as is reasonably necessary to make effective its control over beverage liquor, such power is limited to reasonable regulation and must stop short of the complete prohibition of the use of malt liquor for medicinal purposes, sought to be effected by the Willis-Campbell Act.

It is also contended that the Act violates the Fifth Amendment, because (a) the prohibition of the sale

and use of appellant's stout for medicinal purposes, while permitting the sale of all spirituous and vinous liquor for such purposes, although containing a larger alcoholic content and much more likely to be used for beverage purposes, is so arbitrary and unreasonable as to amount to an unjust discrimination and a taking of appellant's property without due process of law; and (b) the immediate prohibition upon the passage of the Act of the further sale of Guinness's Stout, without giving appellant an opportunity to dispose of its stock on hand, took its property for public use without just compensation.

It appears from appellant's bill (R. 3) that Guinness's Stout consists of pale malt, hops, and a certain amount of roast malt or barley, with the addition of water, and that its alcoholic content, by volume, is from 7 to 8 per cent. It is therefore an intoxicating malt liquor and, like the beer and other malt liquors involved in the Everard's Breweries case, presented and argued with this case, comes specifically within the provisions of the Willis-Campbell Act that only spirituous and vinous liquor may be prescribed for medicinal purposes. The Government's brief in that case will serve as a reply to many questions here presented, and this brief will be confined to additional points raised here but not presented in that case.

**ARGUMENT.****I.****The bill.**

Appellant alleges that its product was used largely for medicinal purposes, but it also appears that some was used for beverage purposes. It is further alleged that 50 per cent of its sales were made directly to wholesale druggists and grocers. The proportion to each is not given, but it is fair to assume that at least a part of the product sold to grocers was used for beverage purposes. The fact that a part was used for nonbeverage purposes did not preclude Congress from legislating with respect to the part used for beverage purposes. It was because of such instances, where intoxicating liquors manufactured and sold ostensibly for medicinal purposes were diverted to beverage purposes, that Congress found it necessary, as had the States in the administration of their prohibition laws, to place a total prohibition upon the use of all malt liquors for medicinal purposes. It developed during the administration of the National Prohibition Act that the law was inadequate and did not accomplish its purpose, and that the constitutional mandate could not be effectively carried out unless the Act was amended so as to cure defects which arose in the course of its enforcement. Congress concluded that to permit the indiscriminate prescribing of malt liquors for medicinal purposes would render the prohibition law of little effect and

that a total prohibition of such prescriptions was necessary to efficient enforcement of the law.

The bill also alleges that of the 435 physicians who replied to questionnaires sent out in 1904, ninety-six stated that they did not prescribe stout as a medicine and 339, or 78 per cent, stated that in their judgment stout possessed valuable medicinal qualities. The inquiries were sent to physicians in New York and elsewhere. Because of the large number of physicians in that State, it may be assumed that the greater number of replies came from New York. Whatever may have been the sentiment on prohibition in that State in 1904, the State law on the subject has recently been repealed. The sentiment on prohibition in a State is reflected in the number of physicians' prescriptions for medicinal liquor. There are approximately 16,500 physicians in the State of New York. The reports to the Prohibition Unit show that approximately 54 per cent of these hold permits to prescribe liquors, while in a number of other States no physicians hold permits to prescribe liquors, and in most of the remaining States the number of permit-holding physicians is small. Conceding that 339, or 78 per cent. of the physicians replied that in their judgment stout possessed medicinal properties, this number, especially when including replies from a State where the percentage of permit-holding physicians is high, is negligible when compared with the evidence before Congress that 82 per cent of the 152,627 physicians of the country prescribe no liquors whatever; that in 24 States no physicians hold permits to prescribe

liquors of any kind, and that only 22 per cent of the physicians of the United States prescribe liquors for medicinal purposes. This evidence came from all the States. Congress legislated for the entire country, in obedience to a popular demand, and not with regard to any particular State or any particular malt liquor.

Moreover, advancing medical science precludes the assumption that the opinions expressed in 1904 necessarily reflected the sentiment of the medical profession on the subject seventeen years later, when Congress concluded, after a thorough investigation, on evidence presented by the most eminent and reputable medical authorities of the country, that malt liquors were not a legitimate medicinal agent. In this connection, it should be noted that only one physician appeared before the committee in advocacy of malt liquors as a medicine. His attitude was promptly repudiated by the Medical Society of the State of New York.

So it can not be said, as appellant contends, that the case is one where it stands admitted that stout is a valuable therapeutic agent and that its predominant use is for medicinal purposes.

## II.

### **Power of Congress under the Tenth Amendment.**

Appellant contends that the grant of power contained in the Eighteenth Amendment is limited by the reservations of the Tenth Amendment; that by

the express language of the Eighteenth Amendment the control over intoxicating liquors conferred on Congress is limited to beverage purposes; that the necessary effect of the Tenth Amendment is to reserve to the several States all power over intoxicating liquor for nonbeverage purposes; that this power is exclusive and the States alone may exercise it, and that Congress is without any legislative power to determine what liquors shall be sold and used for medicinal purposes.

Congress, however, has been given express power to enact legislation to prohibit the use of intoxicating liquor for beverage purposes, and this power carries with it the incidental power to enact such laws and make such regulations as will effectively prevent the manufacture, sale, or transportation of intoxicating liquor for the prohibited purposes.

*McCulloch v. Maryland*, 4 Wheat. 315.

*Purity Extract Co. v. Lynch*, 266 U. S. 192.

*Hoke v. United States*, 227 U. S. 308.

*Ruppert v. Caffey*, 251 U. S. 264.

But appellant earnestly contends that this incidental power can not be exercised so as wholly to prohibit the sale of intoxicating liquor for nonbeverage purposes; that while Congress may, by regulations, permits, limitations on prescriptions, and otherwise, throw safeguards around the sale of liquors for nonbeverage purposes so as to prevent their sale for beverage purposes, it may not, as is attempted in the present Act, wholly usurp the legis-

lative function of the States and altogether prohibit the sale of intoxicating liquors for nonbeverage purposes; that reasonable regulation, under the Tenth Amendment, must stop short of absolute prohibition.

(a) **Argument based on erroneous assumption.**

It first should be observed that appellant's contentions are premised on the erroneous assumption that malt liquors possess valuable medicinal properties. Congress determined that malt liquors have no therapeutic value and are no remedy of any sort for any kind of disease whatever; that they serve no medicinal purpose which can not satisfactorily be met in other ways; that if alcohol be needed it may be prescribed, and that if malt be sometimes of use it may be prescribed, or the two may be combined in a prescription so as to secure their utility. It was shown that an intoxicating beverage, such as appellant's stout, was not an indispensable medium for the administration of either alcohol or malt. The evidence before Congress on the subject was so overwhelming that it can not be said that its conclusion was arbitrary or unreasonable.

(b) **Safeguards suggested by appellant found inadequate.**

The safeguards suggested by appellant have been tried and found inadequate. The evidence submitted to Congress was that under the provisions of the National Prohibition Act, and the regulations made pursuant thereto, the enforcement of the prohibition

Amendment was constantly fettered by various subterfuges and frauds. Prescriptions were issued under the guise of medical prescriptions, but intended for the procurement of liquor for beverage purposes. Liquors manufactured and sold ostensibly for medicinal purposes were diverted to beverage purposes. In fact, the entire scheme of prohibition for beverage purposes as embodied in the Amendment and the National Prohibition Act would have been defeated had not Congress concluded to put an end to the abuse, so far as possible, by prohibiting all traffic in malt liquors.

**(e) Congress not restricted to regulation if absolute prohibition necessary.**

It next is contended that the action of Congress amounted to absolute prohibition and not mere regulation. Of course, if Congress was justified in its conclusion that malt liquors have no medicinal qualities, then it imposed no prohibition on *medicinal* liquors and therefore prohibited nothing reserved to the States.

When Congress possesses the power to prohibit a recognized evil, like the liquor traffic, that power carries with it the inherent power to make such prohibition effective. Congress had power to prohibit the use of intoxicating liquors for beverage purposes and it had the authority to deal with the subject to the extent necessary to make the prohibition effective. To hold otherwise would be to concede that Congress had the power to prohibit,

but did not have the authority to make that power effective.

Appellant concedes that Congress may establish reasonable regulations relating to the prescribing of intoxicating liquor under the power conferred by the Eighteenth Amendment to prohibit the beverage purpose. Every form of regulation implies a partial prohibition. The power to regulate includes the power to prohibit. Regulation means the prohibition of something and the extent of the prohibition is a matter for the determination of Congress, provided only that it stays within the limits of constitutional power. In determining whether legislation may under some circumstances properly take the form or have the effect of prohibition, the nature of the evil sought to be suppressed must be taken into consideration. *Lottery Case*, 188 U. S. 321, 355, 359. It may be that Congress did go to the extreme extent of its power. If so, the exceptional nature of the subject treated was the justification for its action. It was competent for Congress to recognize the difficulties always besetting the administration of laws aimed at the prevention of traffic in intoxicants, the ease with which the law may be violated, and the difficulties of procuring evidence of such violation. The characteristics of intoxicating liquor are such that it lends itself peculiarly to evasions of the law. It is well known that the unrestrained traffic in liquor for alleged medicinal purposes results in great abuses and serves as a ready means of defeating the

constitutional prohibition against the use of same for beverage purposes. To use the language of Chief Justice White in *Clark Distilling Co. v. Western Md. Ry. Co.*, 242 U. S. 311, 332:

The exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guarantees of the Constitution, embrace.

Congress was not restricted to mere regulation, if the end sought could not be accomplished except by prohibition. To prevent the beverage use the States found it necessary to prohibit the medicinal use. The Eighteenth Amendment was designed to prevent the same evil and, it is submitted, vested Congress with the same legislative discretion. The power of a State in the enforcement of its prohibition liquor laws to prohibit, as an incident necessary to their enforcement, the manufacture and sale of liquors for medicinal purposes has been sustained by the highest courts of the States and by this court. This is not, as appellant contends, because the States controlled the entire field of beverage and non-beverage liquors, but the power has been exercised, as an incident to prevent beverage use, where State constitutions contained exceptions in favor of medicinal use. *State v. Durein*, 70 Kans. 1, 17, affirmed 208 U. S. 613; *State v. Macek*, 104 Kans. 742; *State v. Kane*, 15 R. I. 395. Prior to national pro-

hibition, when legislating upon the subject of intoxicating liquors as an incident of some other constitutional power, Congress had authority to prohibit the use of such liquors for medicinal purposes, if in its legislative judgment and discretion such prohibition was necessary to make effective the constitutional power. In *Ruppert v. Caffey*, 251 U. S. 264, this court held that when the United States exercises any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power. Surely, the power of Congress is no less under the express constitutional grant.

As showing the attitude of Congress where it had power to legislate on the subject prior to national prohibition, its legislation prohibiting the introduction of liquors into the Indian country contained no exceptions providing for medicinal use. The Alaska prohibition law permits alcohol only for medicinal use.

While there is a constitutional division, as appellant contends, of power over intoxicating liquors between National and state governments, there is no division of power, except for the concurrent power referred to in the Amendment, with respect to beverage liquors, and Congress has full power to legislate with respect to the latter.

The cases relied on by appellant are not in point. They deal with mining and manufacture and the em-

ployment of child labor therein, the conduct of boards of trade, labor unions, intrastate commerce, taxes on exports from States, and other matters within the exclusive police powers of the States reserved to them under the Tenth Amendment. They present no questions of abuses of or obstructions to powers expressly or impliedly conferred on Congress by the Constitution.

**(d) Power of Congress to legislatively determine therapeutic value of malt liquors.**

It is insisted that the question of whether or not stout has value as a medicine is a question of fact, subject to judicial determination, and that no declaration which Congress may make on the subject is conclusive upon the courts.

It is submitted, however, that this declaration constitutes necessary and practical legislation for the enforcement of the Eighteenth Amendment. It involves the very life of the Amendment; for if the question of whether or not a given intoxicant has therapeutic value be left to the conflicting views of courts and juries, it will be impossible uniformly to enforce the Amendment. If questions of fact be permitted to be introduced in each case so that courts and juries may decide the question upon the weight of the evidence, then the legal views upon the question will depend upon state lines or the boundaries of Federal districts. In one State or district the prescription of a given beverage will be permitted, because found valuable for medicinal purposes, and pro-

hibited in another State or district, because of a contrary view; and the decisions on the subject, especially where juries are concerned, are likely to depend upon or be affected by the sentiment on prohibition in the particular State or district. This would be reverting to conditions which it was the purpose of the Amendment and enforcement law to remedy and would tend to defeat the Amendment because of the opportunities, sure to follow, for diverting prescription liquors into beverage channels.

The contention has been answered, in effect, by this court's decision in *Ruppert v. Caffey, supra*. Before the Eighteenth Amendment, when power so to do was to be found, if at all, in the "appropriate legislation" clauses of the Constitution, or the constitutional war power provision, this court, in the above case, upheld the war-time prohibition definition of intoxicating liquor as being any liquid which contained more than one-half of one per cent of alcohol. It was held, in effect, that Congress, in the light of what experience had demonstrated to the States to be necessary in enforcing prohibition, could declare a fact to exist and, so declaring, could preclude the courts themselves from any judicial examination and finding upon such fact. If Congress could, without the aid of the Eighteenth Amendment, legislatively determine that a malt liquor which contained more than one-half of one per cent of alcohol is *per se* intoxicating, so that the courts are absolutely precluded by this legislative determination, then with the aiding provisions of the

Eighteenth Amendment it can, on the same principle, legislatively determine whether a given intoxicant is or is not a valuable therapeutic agent and preclude the courts from judicially examining and determining that fact for themselves.

The sole question is whether the legislation can be said to be reasonably necessary to enforce the prohibitions of section 1 of the Amendment and adapted to carry out the "appropriate legislation" provision of section 2 thereof. This is the extent of judicial inquiry. If it was, the legislative determination of the controverted question of the therapeutic value of malt liquors will not be reviewed by the courts nor the question determined for themselves.

The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat. *Purity Extract Co. v. Lynch*, 226 U. S. 192, 204.

In *Rast v. Van Deman*, 240 U. S. 342, it was said (p. 357):

It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety.

See also—

*Hebe v. Shaw*, 248 U. S. 297.

*Price v. Illinois*, 238 U. S. 446.

*Atlantic Coast Line v. Georgia*, 234 U. S. 280.

*Armour & Co. v. North Dakota*, 240 U. S. 510.

In the last case it was said (p. 513):

If a belief of evils is not arbitrary we can not measure their extent against the estimates of the legislature, and there is no impeachment of such estimate in differences of opinion, however strongly sustained. And by evils, it was said, there was not necessarily meant some definite injury but obstacles to a greater public welfare. Nor do the courts have to be sure of the precise reasons for the legislation or certainly know them or be convinced of the wisdom or adequacy of the laws.

The National Prohibition Act, to which the present Act is an amendment, provides that all the provisions of the Act shall be liberally construed. The evidence before the committee, the debates upon the measure, the figures showing the number of physicians who do not prescribe liquors, the provisions of the constitutions of the States having prohibition prior to the adoption of the Eighteenth Amendment, are strongly indicative that the overwhelming weight of sentiment among the members of the medical profession is that malt liquors are not a necessary therapeutic agent. Giving the utmost consideration to the opinions of the physicians referred to in appellant's bill, and to others who regard malt liquor as necessary for medicinal use, the best that can be said is that the matter is debatable. This court repeatedly has held that when the evidence showed the subject of legislation enacted in pursuance of a constitutional power to be debatable, the court will

not interfere with the judgment of the legislative body. *Price v. Illinois, supra*, involved the pure food statute of Illinois which prohibited preservatives containing boric acid. Plaintiff contended that boric acid was not injurious to health and offered to submit proof to that effect, but the offer was rejected. In affirming the decision, this court said (pp. 452-453):

The contention of the plaintiff in error could be granted only if it appeared that by a consensus of opinion the preservative was unquestionably harmless with respect to its contemplated uses; that is, that it indubitably must be classed as a wholesome article of commerce so innocuous in its designed use and so unrelated in any way to any possible danger to the public health that the enactment must be considered as a merely arbitrary interference with the property and liberty of the citizen. It is plainly not enough that the subject should be regarded as debatable. If it be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury upon the issue which the legislature had decided.  
\* \* \* The present case is one \* \* \* where the statute \* \* \* specially prohibits preservatives containing boric acid. The legislature thus expressed its judgment and it is sufficient to say, without passing upon the opinions of others adduced in argument, that the action of the legislature can not be considered to be arbitrary. Its judgment appears to have sufficient support to be taken out of that category.

In *Hebe Company v. Shaw, supra*, it is said (p. 303):

If the character or effect of the article as intended to be used "be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury," or, we may add, by the personal opinions of judges, upon the issue which the legislature has decided.

(e) **Internal affairs of States only incidentally and indirectly affected.**

Complaint is made that the Act usurps the legislative function of the States. But there is no attempt to usurp the legislative functions of the States, regulate their internal affairs, or interfere with anything reserved to them by the Tenth Amendment further than is reasonably necessary. There is no attempt unduly to restrict the calling of physicians or druggists, or to invade the domain of the medical profession. Internal regulation is interfered with, if at all, only to the extent of maintaining efficient regulation of beverage liquors under the paramount power of Congress. The purpose of the Act is to suppress the beverage use, not to supervise medicinal use within the States. It does not contemplate any general prohibition of medicinal liquors, but confines itself to prohibition for beverage purpose. In order effectively to accomplish this purpose Congress found it necessary indirectly to encroach upon state authority, but if the Act be otherwise within the powers specifically conferred upon Congress it is not invalidated because of the

indirect and incidental effect it may have upon state powers.

*Southern Ry. Co. v. United States*, 222 U. S. 20.

*Minnesota Rate Cases*, 230 U. S. 352.

*United States v. Doremus*, 249 U. S. 86.

*Wisconsin R. R. Com. v. C. B. & Q. R. R. Co.*, 257 U. S. 563.

(f) **Conflicting state laws subordinate to paramount law of Congress.**

It is also urged that the laws of the State of New York, where appellant's place of business is located, permit the sale of stout for medicinal purposes; that these laws are valid and are the measure of appellant's rights.

Congress, acting pursuant to constitutional authority, vested by the Eighteenth Amendment, has assumed control of the beverage liquor field. Any enactment by it, if within the specific powers conferred, becomes the supreme law of the land, and the acts of a State, whether exercised under its police power or otherwise, which are in conflict therewith, must be subservient to it.

*Leisy v. Hardin*, 135 U. S. 100.

*Flaherty v. Hanson*, 215 U. S. 515.

*Eubank v. Richmond*, 226 U. S. 137.

*Jacobson v. Massachusetts*, 197 U. S. 11.

In the last case it was said (p. 25):

A local enactment or regulation, even if based on the acknowledged police powers of a State, must always yield in case of conflict

with the exercise by the general government of any power it possesses under the Constitution.

And in *Flaherty v. Hanson, supra* (p. 525):

A State may not so exercise its police powers as to directly hamper or destroy a lawful authority of the Government of the United States.

### III.

#### **The Act not invalidated by the Fifth Amendment.**

It is contended that the legislation is invalidated by the Fifth Amendment, first, because the Act in prohibiting the use of Guinness's Stout for medicinal purposes, while permitting the use for such purposes of spirituous and vinous liquors, is arbitrary, capricious, and unreasonable; and, secondly, because the Volstead Act, which permitted the use of stout for medicinal purposes, was declarative of a national policy to that effect and amounted to an assurance to appellant that its stock then on hand could thereafter lawfully be disposed of for those purposes, whereas the Willis-Campbell Act, subsequently passed, immediately prohibited the further use of said stout and thereby took appellant's property for public use without just compensation.

#### A.

The contention that the Act constitutes an unjust discrimination against appellant because it prohibits absolutely the prescribing of Guinness's Stout and

other malt liquors, while permitting the prescribing of spirituous and vinous liquors, can not be maintained.

Congress was empowered to prohibit the use of intoxicating liquors for beverage purposes, and it could fix the conditions necessary to make that power effective. The details of such legislation rested with Congress, and the courts can not interfere unless fundamental rights guaranteed by the Constitution were violated. The extent of the prohibition and the subjects to which it should be applied, were matters within its legislative discretion and were not, as appellant contends, reserved to the States.

The need for such legislation was clearly set forth, and Congress deemed the legislation imperative to accomplish the effective enforcement of the Amendment and prohibition law. The Act should be so construed as to give effect to its manifest purpose and intent. It was represented that if malt liquors were permitted as a medicine it would be impossible to enforce prohibition. From the large number of breweries which had filed applications for permits to manufacture malt liquors it was apparent that their product would be forced into illegitimate channels. A majority of the States had prohibited the prescription of malt liquors for medical purposes and in others the quantity of intoxicating liquor which might be prescribed was so small as to indicate that it was not intended that malt liquors should be prescribed for such purposes. These considerations,

and the determination that malt liquors possess no therapeutic value, afford adequate basis for the prohibition and it can not be said that the classification was so arbitrary and unreasonable as to constitute an unjust discrimination against appellant and other distributors of malt liquors. The prohibition of malt liquors as a medicine has a real and substantial relation to the prohibition of such liquors as a beverage.

Whether, as appellant contends, the prohibition should have been applied to spirituous and vinous liquors, because they contain a larger alcoholic content and offer greater facility for illegal use, rather than to malt liquors, was a matter for Congress to determine and will not be reviewed by this court. That the prohibition was not also extended to spirituous and vinous liquors, even if Congress had power so to do, is immaterial and does not affect the prohibition placed on malt liquors, if there was substantial basis for the selection made in the exercise of the legislative discretion.

Moreover, appellant can not complain of any unjust discrimination, because it has no inherent right to sell and distribute malt liquors.

*Mugler v. Kansas*, 123 U. S. 623.

*Crane v. Campbell*, 245 U. S. 304.

## B.

Finally, it is claimed that as no provision was made for compensating appellant for the loss which it would sustain from the enforcement of the Act, and

as the effective date of the Act was not postponed for a period so that appellant might dispose of its stock, its property was taken for public use without just compensation.

This claim has been disposed of contrary to appellant's contention by this court's decisions in the following cases:

*Mugler v. Kansas*, 123 U. S. 623, 637.

*Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146.

*Ruppert v. Caffey*, 251 U. S. 264.

#### CONCLUSION.

It is respectfully submitted that the Willis-Campbell Act is a valid exercise of the power conferred upon Congress by the Eighteenth Amendment; that appellant was deprived of no constitutional rights, and that the action of the District Court in dismissing appellant's bill should be affirmed.

JAMES M. BECK,

*Solicitor General.*

MABEL WALKER WILLEBRANDT,

*Assistant Attorney General.*

MAHLON D. KIEFER,

*Attorney.*

JANUARY, 1924.





# In the Supreme Court of the United States.

OCTOBER TERM, 1923.

PIEL BROS., APPELLANT,

v.

RALPH A. DAY, FEDERAL PROHIBITION  
Director for the State of New York; John  
Rafferty, Collector of Internal Revenue  
for the First District of New York, et al.

No. 95.

*APPEAL FROM THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE SECOND CIRCUIT.*

JAMES EVERARD'S BREWERIES, APPELLANT,

v.

RALPH A. DAY, PROHIBITION DIRECTOR OF  
New York, et al.

No. 200.

EDWARD AND JOHN BURKE (LIMITED),  
appellant,

v.

DAVID H. BLAIR, COMMISSIONER OF IN-  
ternal Revenue, et al.

No. 245.

*APPEALS FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.*

**SUPPLEMENTAL BRIEF FOR APPELLEES.**

The brief already filed by the Government in this case does not suggest, or at least adequately suggest, the view of the Eighteenth Amendment which, if sound, is fatal to the Appellants' contention in the instant cases.

Throughout all the briefs filed in these cases, there seems to be a confusion of terms with respect to "beverage" and "nonbeverage" liquors. In the former class are included intoxicating liquors which are sold and used merely for the pleasure of drinking, while in the latter class is included the use of the same intoxicating liquors when the object is not for the mere pleasure of drinking, but for some special purpose as, for example, either medicinal purposes or as a religious rite.

The Eighteenth Amendment does not, at least in terms, suggest any such distinction. Its first clause is a general prohibition of the manufacture and transportation of intoxicating liquors "for beverage purposes," and undoubtedly the common interpretation of those words means nothing more than for the purposes of drinking. Undoubtedly there are beverage and nonbeverage liquors. For example, pure alcohol or wood alcohol, while highly intoxicating, could not be called a "beverage," for they are not commonly taken as a drink and may not with safety be so used.

Again, there are many medicinal preparations which contain alcohol in sufficient quantities to be

intoxicating; but they are so prepared and medicated as to be unpalatable for beverage purposes.

The distinction between an intoxicating liquor that is not adaptable for the purpose of drinking and an intoxicating liquor that, in form and substance, is thus adaptable is a very clear one. It does not, however, depend upon the object of the drinker—however worthy and proper. The phraseology of the briefs filed in these cases, which persistently classifies distilled spirits, wines, and malted liquors as “nonbeverage” if the particular owner uses them for a special purpose, is not sound and is not justified by the plain language of the first section of the Eighteenth Amendment.

Did the Eighteenth Amendment, then, intend to prohibit certain uses of intoxicating liquors which are sanctioned by the laws of many prohibition States? If this were so, it is probable that the Eighteenth Amendment would not have been adopted. In my opinion, the answer is that the Eighteenth Amendment was intended to provide a general prohibition which, in itself and of its own vigor, would create no exceptions, but which, in the second clause, would leave to Congress the question of so enforcing the law as to permit certain special uses, which, by almost universal consent, were regarded as legitimate.

In other words, the question as to what exceptions could be made of certain specific purposes, which were not within the evil at which the Eighteenth Amendment was aimed, was left to the sound dis-

cretion of Congress. If this view be correct, there can be no question as to the power of Congress to determine, within its broad discretion, that malted liquors have so little therapeutic value that their use as medicine could not be sanctioned or, in any event, that if they have therapeutic value, yet such use would lead to abuses which would go far to destroy the Eighteenth Amendment.

The Eighteenth Amendment clearly indicates that the scope of the prohibition and the details of its enforcement were to be left to Congress. In a sense the Amendment does not act *in personam*. It does not say that a man may not drink intoxicating liquors. In a sense, it does not act even *in rem*, for it does not act *directly* upon the contraband merchandise. Its inhibition is directed to the facilities of manufacture and transportation. Undoubtedly its objective was to stop the habit of drinking intoxicating liquors in the United States, and it sought to accomplish this by cutting off the base of supplies. What was forbidden was the manufacture and transportation of intoxicating liquors for beverage purposes; but not only was the method of enforcement left to Congress, but even the definition of "intoxicating liquors" and of "beverage purposes" was not provided by the Constitution itself. The details of definition and enforcement were left primarily to Congress, under the second clause, and, ultimately, to the judiciary, for fair interpretation. Therefore the Amendment simply conferred upon the Federal Government power to prohibit the manufacture and transportation of intox-

icating liquors for beverage purposes, and the common and easily understood meaning of the word "beverage" was for the purpose of drinking. It sought to end what was regarded as a pernicious habit, and it did not undertake to define what was a legitimate permitted use of intoxicating liquors as a beverage and what was not. All this, following the whole scheme and phraseology of the Constitution, was left to the sound discretion of Congress, *within reasonable limits.*

The Amendment as proposed to the States was not a new expedient. Before Congress took this action the subject had been discussed for several generations and had resulted, in the States, in many Constitutional provisions and statutory laws.<sup>1</sup> Upon these had been built a very considerable superstructure of judicial construction.

Prior to the submission to the States of the Eighteenth Amendment there were already in the Constitutions of at least seventeen States a prohibition of intoxicating liquors. Some of these, as, for example, Arizona, simply prohibited intoxicating liquors, without any exception in favor of such permitted use for medicinal purposes. The Constitutions of other States, as, for example, Kansas, contained an express exception in favor of the manufacture and sale of

---

<sup>1</sup> An Appendix to this brief contains the Constitutional clauses of a number of States as they existed when the Eighteenth Amendment was proposed and ratified. While the list is not complete, it will give the Court a very fair idea of the character of the State amendments, which Congress presumably considered when it formulated the Eighteenth Amendment.

intoxicating liquors for medical, scientific, and mechanical purposes.

Of the first class, some of the absolute prohibitions were construed by the highest Courts of the respective States to permit, if the Legislature provided, the use of intoxicating liquors for specially permitted purposes; while in other States the absolute prohibition was construed, as in the case of Arizona, as outlawing the use of intoxicating liquors for any purpose—and the Legislature was powerless to create an exception.

Of the second class, it was held in some States (Kansas, for example) that while the Constitution thus expressly exempted from the prohibition of the statute the use of intoxicating liquors for certain special purposes, yet it was within the power of the Legislature, if it thought that such permitted uses conflicted with the enforcement of the general prohibition, to forbid them also.

In nearly all the instances, with few exceptions, the Legislatures of the various States, in enforcing the Constitutional prohibition, were given a reasonable discretion to determine under what special conditions and for what special purposes the use of intoxicating liquors should be permitted. Thus in twelve States (Arizona, Utah, Maine, New Mexico, North Dakota, Georgia, Kansas, Nebraska, North Carolina, Idaho, Washington, and West Virginia) no intoxicating liquors of any kind might be prescribed under the enforcing legislation; while in eleven States (Alabama, Arkansas, Delaware, Florida, In-

diana, Mississippi, Oklahoma, Oregon, South Carolina, Tennessee, and Texas) pure alcohol only could be prescribed.

In thirty-five States malt liquors were regarded, for the purpose of determining the question of permitted use for special purposes, as in a class by themselves, for of thirty-five States twelve forbade malted liquors, twelve forbade all intoxicating liquors, and eleven prohibited intoxicating liquors for medicinal purposes, with the exception that pure alcohol, which can not be described as a beverage, might be prescribed by physicians.

In all the cases where the medicinal use of intoxicating liquors was permitted there were the most minute and restrictive regulations of the right of either physician or druggist to prescribe.

The Court will find all these statutory provisions summarized in the brief of the nineteen Attorneys General, filed as *amici curiae* in the *Everard Breweries case* (No. 200).

While some of this legislation was subsequent to the Federal Prohibition Amendment, yet most of it antedated it. These Constitutional provisions and statutory laws had given rise to a great volume of decisions, some of which had reached this Court under the Fourteenth Amendment, and it had been uniformly held, both by the highest Courts of the States and this Court, that the power to regulate intoxicating liquors not only carried with it the power to proscribe intoxicating liquors, but, when necessary,

liquors which were similar in appearance to intoxicating liquors, but, in fact, not intoxicating at all.

*Purity Extract Co. v. Lynch*, 226 U. S. 192.  
*Ruppert v. Caffey*, 251 U. S. 264.

In the latter case the Court will find, in the elaborate footnotes to the exhaustive opinion of Mr. Justice Brandeis, references to many of these Constitutional provisions and statutory laws.

All this body of Constitutional and statutory law and judicial decisions thereon was unquestionably before Congress when it drafted the Eighteenth Amendment. It was not building the foundations of a new public policy; it was only erecting a superstructure thereon.

Bearing this fact in mind, it is very significant that the Eighteenth Amendment made no exception in favor of the special use of intoxicating liquors, which many of the States had regarded as legitimate and not inconsistent with the main purpose of their prohibitory laws. Section 1 is a flat prohibition of the manufacture and transportation of "intoxicating liquors \* \* \* for beverage purposes." It could not have been an oversight on the part of Congress in framing the proposed Amendment, when it failed to except the use of intoxicating liquors for industrial, medicinal, and sacramental purposes.

I do not contend that the Eighteenth Amendment was intended, by its own force, to forbid such permitted uses; but I do contend that the first and second sections of the Amendment should be read together and that they manifest a clear purpose, in

harmony with the policy of most of the States, to make a general prohibition of the manufacture and transportation of intoxicating liquors for beverage purposes, and then to leave to the discretion of the legislative body, *within reasonable limits*, what permitted uses could be recognized that would not be inconsistent with the *general* policy of prohibition.

Inasmuch as concurrent power of both State and Nation was clearly contemplated, it is a fair assumption that the Eighteenth Amendment was intended to harmonize with the general policy of the States. Moreover, the form and structure of the Eighteenth Amendment were to be in harmony with the Constitution in stating general principles, but leaving the details to legislative discretion. For example, the Amendment does not suggest any definition of "intoxicating liquors," and even experts might disagree as to what is, in a given case, such a liquor. Therefore, the second clause empowered Congress in enforcing the general policy of prohibition to determine what was an "intoxicating liquor."

Again, the prohibition of the Eighteenth Amendment extends to such liquors "for beverage purposes"; but again there is a failure to define what is a "beverage purpose," and again a broad discretion was vested in Congress to determine whether a special use for an intoxicating liquor, as, for example, for medicinal or sacramental purposes, was a "beverage purpose" within the meaning of the law.

Possibly the late Chief Justice White had this theory in mind when, in his concurring opinion in the

*National Prohibition cases* (253 U. S. 350, 390), he said:

In the first place, it is indisputable, as I have stated, that the first section imposes a *general* prohibition which it was the purpose to make universally and uniformly operative and efficacious. In the second place, as the prohibition did not define the intoxicating beverages which it prohibited, in the absence of anything to the contrary, it clearly, from the very fact of its adoption, cast upon Congress the duty, not only of defining the prohibited beverages, but also of enacting such regulations and sanctions as were essential to make it operative when defined. In the third place, when the second section is considered with these truths in mind, it becomes clear that it simply manifests a like purpose to adjust, as far as possible, the exercise of the new powers cast upon Congress by the Amendment to the dual system of government existing under the Constitution. (Italics mine.)

I respectfully submit that the only rational construction of the Eighteenth Amendment is the one above suggested, under which the Amendment neither forbids nor licenses the special use of intoxicating liquors, but contents itself with a general prohibition, leaving to Congress the discretionary power of determining what exceptions may fairly be implied that would not be destructive of the general prohibition.

This does not mean that Congress has any unlimited discretion in the matter. It can not create, by statutory law, an exception which would defeat the law;

but, in harmony with the legislation of the States, with which the Amendment sought to work in cooperation to suppress a great evil, Congress, to whom the duty was committed of providing enforcing statutes, was empowered to say, *within reasonable limits*, under what circumstances and for what special purposes the general prohibition should not be enforced in its rigid letter.

If this view be sound, then the power of Congress to determine amounts of intoxicating liquors a druggist could be permitted to have, and its power to vest in the Treasury Department, and especially in the Commissioner of Internal Revenue, the determination of the question of the quantity of liquor that any pharmacist or physician might have or prescribe for a special purpose permitted by the law is clear.

Even if this interpretation of the Eighteenth Amendment is not correct, the fact remains that, even though the Eighteenth Amendment does not forbid the use of intoxicating liquors for medicinal purposes, yet, if Congress reaches the conclusion that, in enforcing the policy of prohibition, it is necessary to forbid any special use of so-called "nonbeverage liquors," its power is equally beyond dispute. (See *Purity Extract Co. v. Lynch*, 226 U. S. 192.) If, as in the case last cited, a State, in enforcing its laws against intoxicating liquors, may forbid the use of a liquor which is, in fact, not intoxicating, then, *a fortiori*, it can forbid an otherwise legitimate use of intoxicating liquors, if such inhibi-

tion is necessary to prevent the traffic in such liquors for so-called "beverage" purposes. Therefore, for the purpose of the instant cases, it is not important whether the Court construes the Eighteenth Amendment as either impliedly permitting or impliedly forbidding the manufacture and transportation of intoxicating liquors for medicinal or other special purposes, sometimes inaptly called "nonbeverage" purposes, for, in either event, the power of Congress under clause Second of the Eighteenth Amendment to do whatever it, in good faith, regards as reasonably appropriate to carry into effect the great policy of the Amendment still remains.

But the true construction of the Eighteenth Amendment may be of great importance in other cases that may hereafter arise. That the Eighteenth Amendment will remain a part of the Constitution, as far as the vision of man can now see, seems reasonably probable. It is a great, and, in its laudable motive, a noble experiment in moral reform, and its success may hereafter depend, to some extent, upon its adaptability to what is possible in a nation such as ours. To make Prohibition really effective may require much more drastic legislation than anything now on the statute books. Thus it may become necessary to forbid absolutely the use of intoxicating liquors of any kind for medicinal purposes. If so, it is important that the power of Congress to do so should be recognized in these cases.

Upon the other hand, it may seem necessary to Congress, if the policy of Prohibition is to be sustained in the test of practical application and is to have be-

hind it the force of public opinion, to enlarge the special uses for which intoxicating liquors may be manufactured and transported, which, as in the case of Church ceremonials, certainly have the approval of the great majority of our people.

If the law is not sufficiently elastic to permit its adaptation to the necessities and convictions of the people, then it may, in the course of a generation, become as much a dead letter as the Fifteenth Amendment. All laws rest, in the last analysis, upon public opinion. No form of government and no scheme of legislation can long endure if hostile to the political capacities and moral convictions of the people; and the success of this great moral experiment, therefore, lies in its elasticity, and this fact was presumably recognized by the propounders of the Eighteenth Amendment when its language was confined to the statement of a general objective and the details of enforcement were left to the sound discretion of Congress.

It is wholly improbable that the language of the Amendment will be altered; but Congress, in enforcing the article by appropriate legislation, may make such provisions as the experience of each successive generation may seem, in the wisdom of Congress, to justify.

The Judicial Department of the Government should, I respectfully submit, sustain Congress in the exercise of this discretion, unless and until the Congress clearly transgresses or evades its power and duty of enforcement.

JAMES M. BECK,  
*Solicitor General.*

MARCH, 1924.

## APPENDIX.

---

### FLORIDA.

[Article XIX, Constitution of Florida, adopted November 5, 1918, effective January 1, 1919.]

“SECTION 1. The manufacture, sale, barter, or exchange of all alcoholic or intoxicating liquors and beverages, whether spirituous, vinous or malt, are hereby forever prohibited in the State of Florida, except alcohol for medical, scientific or mechanical purposes, and wine for sacramental purposes, the sale of which wine and alcohol for the purposes aforesaid shall be regulated by law.

“SEC. 2. The Legislature shall enact suitable laws for the enforcement of the provisions of this article.

“SEC. 3. This article shall go into effect the first day of January, A. D. 1919.”

### IDAHO.

[Article III, Constitution of Idaho, adopted November 7, 1916, effective May 1, 1917.]

“SECTION 26. From and after the first day of May in the year 1917, the manufacture, sale, keeping for sale, and transportation for sale of intoxicating liquors for beverage purposes, are forever prohibited. The Legislature shall enforce this section by all needful legislation.”

### KANSAS.

[Article XV, Section X, Constitution of Kansas, adopted 1880.]

“The manufacture and sale of intoxicating liquor shall be forever prohibited in this State, except for medicinal, scientific and mechanical purposes.”

## MAINE.

[Article V, Amended, Constitution of Maine, adopted 1884.]

"The manufacture of intoxicating liquors, not including cider, and the sale and keeping for sale of intoxicating liquors, are and shall be forever prohibited. Except, however, that the sale and keeping for sale of such liquors for medicinal and mechanical purposes and the arts, and the sale and keeping for sale of cider may be permitted under such regulations as the Legislature may provide. The Legislature may enact laws with suitable penalties for the suppression of the manufacture, sale and keeping for sale of intoxicating liquors, with the exceptions herein specified."

## MICHIGAN.

[Article XV, adopted November 7, 1916, effective May 1, 1918.]

"The manufacture, sale, keeping for sale, giving away, bartering or furnishing of any vinous, malt, brewed, fermented, spirituous or intoxicating liquors, except for medicinal, chemical, scientific or sacramental purposes shall be, after April 30, 1918, prohibited in the State forever. The Legislature shall by law provide regulations for the sale of such liquors for medicinal, mechanical, chemical, scientific and sacramental purposes."

## NEBRASKA.

[Article XVII, adopted November 7, 1916, effective May 1, 1917.]

"On and after May 1, 1917, the manufacture for sale, the keeping for sale or barter, the sale or barter under any pretext, of malt, spirituous, vinous or other intoxicating liquors, are forever prohibited in this State, except for medicinal, mechanical, or sacramental purposes."

## NEW MEXICO.

[Article XXIII, adopted November 6, 1917, effective October 1, 1918.]

"SECTION 1. From and after the first day of October, A. D. nineteen hundred and eighteen, no person, association or corporation, shall within this State, manufacture for sale, barter or gift any ardent spirits, ale, beer, alcohol, wine or liquor of any kind whatsoever containing alcohol; and no person, association or corporation shall import into this State any such liquors or beverages for sale, barter or gift, and no person, association or corporation shall within this State sell or barter, or keep for sale or barter, any of such liquors or beverages for sale, barter or trade; provided nothing in this section shall be held to apply to denatured or wood alcohol, or grain alcohol when intended and used for medicinal, mechanical or scientific purposes only, or to wine when intended and used for sacramental purposes only.

"SEC. 2. Until otherwise provided by law, any person violating any of the provisions of section one (1) of this article shall, upon conviction, be punished by a fine of not less than fifty dollars nor more than one thousand dollars or shall be imprisoned in the county jail for not less than thirty days nor more than six months, or by both such fine and imprisonment, and upon conviction for a second and subsequent violation of said section such person shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, and shall be imprisoned in the county jail or State penitentiary for a term of not less than three months nor more than one year."

## NORTH DAKOTA.

[Article XX, Section 217, adopted October 1, 1889, effective November 2, 1889.]

"No person, association or corporation shall within this State, manufacture for sale or gift, any intoxicating liquors, and no person, association or corporation shall import any of the same for sale, or gift, barter or trade as a beverage. The Legislative Assembly shall by law prescribe regulations for the enforcement of the provisions of this article and shall thereby provide suitable penalties for the violation thereof."

## OHIO.

[Article XV, Section 9, adopted November 5, 1918, effective May 27, 1919.]

"The sale and manufacture for sale of intoxicating liquors as a beverage are hereby prohibited. The General Assembly shall enact laws to make this provision effective. Nothing herein contained shall prevent the manufacture or sale of such liquors for medicinal, industrial, scientific, sacramental or other nonbeverage purposes."

## OREGON.

[NOTE.—There have been two prohibition amendments in Oregon. The first adopted November 3, 1914, prohibited manufacture and sale, the second adopted November 7, 1916, prohibited importation.]

[Article I, Section 36, adopted November 3, 1914.]

"From and after January 1, 1916, no intoxicating liquors shall be manufactured or sold within this State except for medicinal purposes upon prescription of a licensed physician, or for scientific, sacramental or mechanical purposes.

"This section is self-executing, and all provisions of the Constitution and laws of this State and of the

charters and ordinances of all cities, towns and other municipalities therein, in conflict with the provisions of this section are hereby repealed."

[Article I, Section 36a, adopted November 7, 1916, effective December 5, 1916.]

"No intoxicating liquors shall be imported into this State for beverage purposes.

"This section is self-executing, and all provisions of the Constitution and laws of this State and of the charters and ordinances of all cities, towns and other municipalities therein, in conflict with the provisions of this section, are hereby repealed."

#### SOUTH DAKOTA.

[Article XXIV, adopted November 7, 1916, effective July 1, 1917.]

#### TEXAS.

[Article XVI, Section 20.]

(Amendment to Constitution Adopted at Election May 24, 1919.)

"SECTION 20. (a) The manufacture, sale, barter and exchange in the State of Texas, of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, or any other intoxicant whatever except for medicinal, mechanical, scientific or sacramental purposes, are each and all hereby prohibited.

"The Legislature shall enact laws to enforce this section.

"(b) Until the Legislature shall prescribe other or different regulations on the subject, the sale of spirituous, vinous or malt liquors, or medicated bitters, capable of producing intoxication or any other intoxicant whatever, for medicinal purposes, shall be made only in cases of actual sickness and then only upon the prescription of a regular practicing

physician, subject to the regulations applicable to sales under prescriptions in prohibited territory by virtue of Article 598, Chapter 7, Title II, of the Penal Code of the State of Texas.

"(c) This amendment is self-operative and until the Legislature shall prescribe other or different penalties, any person acting for himself or in behalf of another, or in behalf of any partnership, corporation, or association of persons, who shall, after the adoption of this amendment, violate any part of this constitutional provision, shall be deemed guilty of a felony, and shall, upon conviction in a prosecution commenced, carried on and concluded in the manner prescribed by law in cases of felonies, be punished by confinement in the penitentiary for a period of time not less than one year nor more than five years, without the benefit of any law providing for suspended sentence. And the district courts and the judges thereof, under their equity powers shall have the authority to issue, upon suit of the attorney general, injunctions against infractions or threatened infractions of any part of this constitutional provision.

"(d) Without affecting the provisions herein, intoxicating liquors are declared to be subject to the general police power of the State; and the Legislature shall have the power to pass any additional prohibitory laws, or laws in aid thereof, which it may deem advisable.

"(e) Liability for violating any liquor laws in force at the time of the adoption of this amendment shall not be affected by this amendment, and all remedies, civil and criminal, for such violations shall be preserved."



JAN 21 1924

WM. R. STANSBURY

CLERK

# Supreme Court of the United States,

OCTOBER TERM, 1923.

No. 245.

---

EDWARD AND JOHN BURKE, LIMITED,  
*Appellant,*

*vs.*

DAVID H. BLAIR,  
Commissioner of Internal Revenue, *et al.,*  
*Appellees.*

---

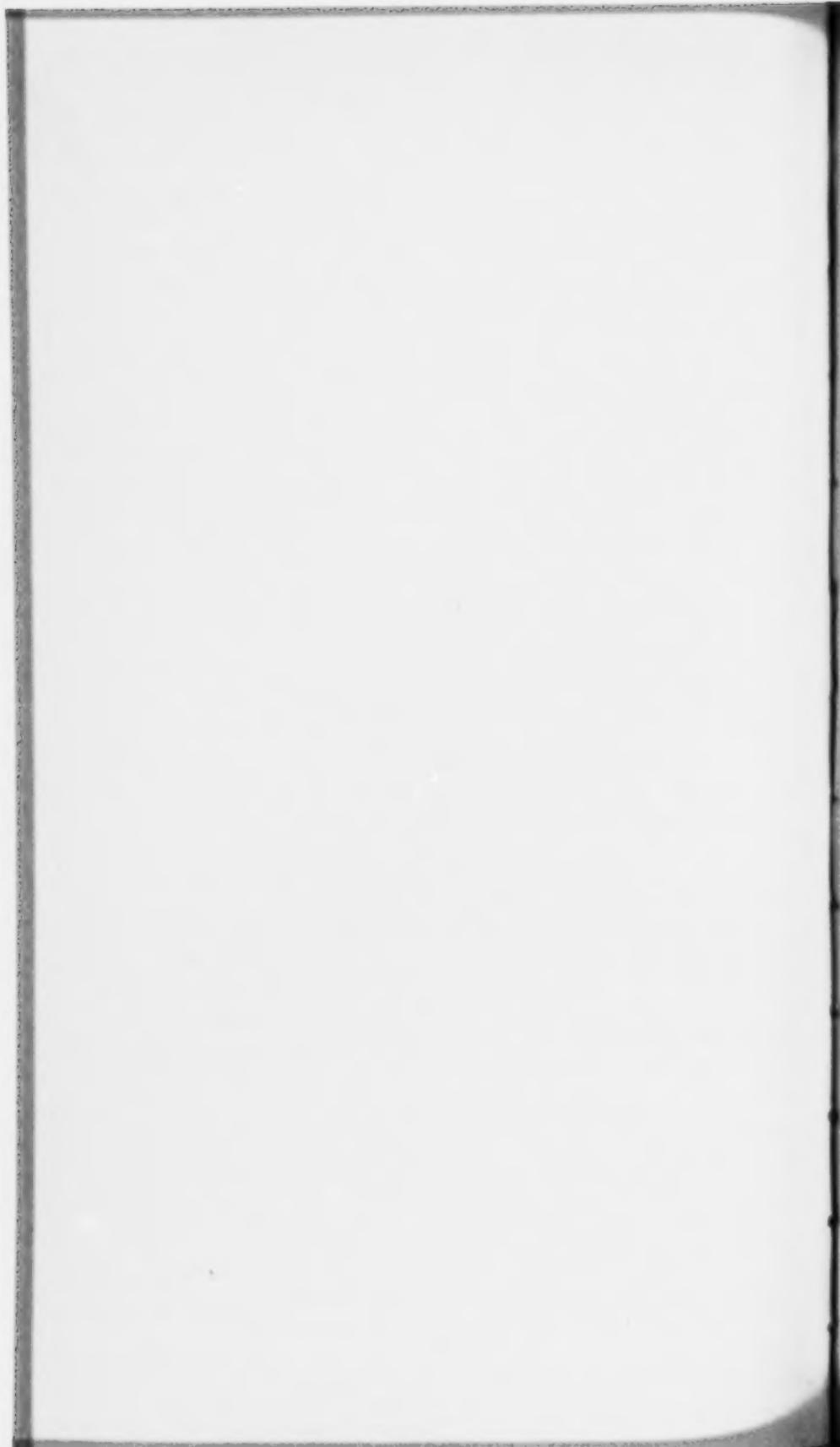
APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

---

MOTION TO SUBSTITUTE PALMER CANFIELD,  
FEDERAL PROHIBITION DIRECTOR FOR THE  
STATE OF NEW YORK, AS DEFENDANT AND  
APPELLEE HEREIN, IN SUCCESSION TO E. C.  
YELLOWLEY.

---

SAMUEL W. MOORE,  
MARCUS L. BELL,  
*Solicitors for Appellant.*



# Supreme Court of the United States,

OCTOBER TERM, 1923.

No. 245.

EDWARD AND JOHN BURKE, LIMITED,  
Appellant,

*vs.*

DAVID H. BLAIR, Commissioner of  
Internal Revenue, *et al.*,  
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

**Motion to substitute Palmer Canfield, Federal Prohibition Director for the State of New York, as defendant and appellee herein, in succession to E. C. Yellowley.**

Comes now the appellant, Edward and John Burke, Limited, and moves the Court to substitute Palmer Canfield, the present Federal Prohibition Director for the State of New York, as a party defendant and appellee herein, in place of defendant and appellee E. C. Yellowley, and as ground for the motion assigns the following:

At the time of the institution of this action, in November, 1922, the said E. C. Yellowley was the Acting Federal Prohibition Director for the State of New York,

and was made a party defendant in that official capacity. Thereafter, and in April, 1923, the said E. C. Yellowley was removed from said office and transferred to Washington, D. C., and the said Palmer Canfield is his successor in office, and is now the duly appointed and acting Federal Prohibition Director for the State of New York, and the presence herein as a party defendant and appellee of the person holding said office and performing the duties thereof, is necessary to obtain a settlement of the questions involved.

There is no objection on the part of the Government to the granting of this motion.

SAMUEL W. MOORE,

MARCUS L. BELL,

*Solicitors for Appellant.*

January, 1924.

—  
—  
—



Office Supreme Court, U. S.  
FILED  
FEB 25 1924  
WM. R. STANSBURY  
CLERK

# Supreme Court of the United States,

OCTOBER TERM, 1923.

No. 245.

---

EDWARD AND JOHN BURKE, LIMITED,

*Appellant,*

*vs.*

DAVID H. BLAIR,  
Commissioner of Internal Revenue, *et al.*,

*Appellees.*

---

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

---

## REPLY BRIEF FOR APPELLANT.

---

SAMUEL W. MOORE,  
MARCUS L. BELL,  
*Solicitors for Appellant.*



## INDEX.

---

	PAGE
I. The fallacy involved in the Government's position .....	1
The authorities relied upon by the Government do not sustain its position.....	4
Limitations upon the incidental power of Congress .....	8
II. There is no justification for the statement in appellee's brief that stout possesses no therapeutic value .....	14
III. Stout is recognized as a valuable therapeutic agent by standard medical authorities....	19
IV. The Government's answer to appellant's claim under the Fifth Amendment is not convincing .....	31

### CASES AND MEDICAL AUTHORITIES CITED

Adkins <i>v.</i> Children's Hospital, 261 U. S. 525.....	10
Barr, Sir James, <i>Alcohol as a Therapeutic Agent</i>	28
Bartholow, Roberts, <i>Materia Medica and Therapeutics</i> .....	26
Bastedo, Walter A., <i>Materia Medica Pharmacology and Therapeutics</i> .....	25
Bergey, D. H., <i>Principles of Hygiene</i> .....	22

	PAGE
Brown, W. Langdon, <i>The Practitioner's Encyclopedia of Medical Treatment</i> .....	24
Butts v. Merchants Transp. Co., 230 U. S. 126.....	12
Civil Rights Cases, 109 U. S. 3.....	11
Corneli v. Moore, 257 U. S. 491.....	35
Cushny, Arthur R., <i>Pharmacology and Therapeutics</i> .....	29
Falstaff v. Allen, 278 Fed. 643.....	35
Federal Employers' Liability Cases.....	9
First National Bank v. Missouri, decided January 28, 1924.....	7
Fitch, William Edward, <i>Dietotherapy</i> .....	29
Friedenwald, <i>Diet in Health and Disease</i> .....	29
Hallowell v. U. S., 221 U. S. 317.....	7
Hamilton v. Kentucky Distilleries Co., 251 U. S. 146 .....	6
Hare, Hobart Amory, <i>Practical Therapeutics</i> .....	24
Hodges v. U. S., 203 U. S. 1.....	10
House Report No. 224, 67th Congress, 1st Session.....	18
Hutchison, Robert, <i>Food and Dietetics</i> .....	20
James v. Bowman, 190 U. S. 127.....	12
Lambert v. Yellowley, 291 Fed. 640.....	14
Lewis, H. Edwin, <i>Diet for the Sick</i> .....	25
Lottery Case, 188 U. S. 321.....	7
Mallory, William J., <i>The Effects of Alcohol on the Gastro-intestinal Tract</i> .....	28
Mugler v. Kansas, 123 U. S. 623.....	34
Northern Pacific R. Co. v. North Dakota, 250 U. S. 135 .....	6
Purity Extract Co. v. Lynch, 226 U. S. 192.....	5

	PAGE
Remington & Wood, <i>The Dispensatory of the United States of America</i> .....	30
Ruppert v. Caffey, 251 U. S. 264.....	6
Sajous, Charles E. de M., <i>Analytical Cyclopedias of Practical Medicine</i> .....	25
Selective Draft Law Cases, 245 U. S. 366.....	6
Senate Report No. 201, 67th Congress, 1st Session	15
Shaffer v. Carter, 252 U. S. 37, 50.....	13
Shattuck, George Cheever, <i>Principles of Medical Treatment</i> .....	23
Shoemaker, John V., <i>Materia Medica and Therapeutics</i> .....	23
Stevens, A. A., <i>Modern Materia Medica and Therapeutics</i> .....	20
Tibbles, William, <i>Dietetics</i> .....	21
Thompson, W. Gilman, <i>Practical Dietetics</i> .....	30
United States v. Sandoval, 231 U. S. 28.....	7
Watson, Chalmers, <i>Encyclopedia Medica</i> .....	23
Wilcox, Reynold Webb, <i>Materia Medica and Therapeutics</i> .....	22
Williams, Robert F., <i>Food and Diets</i> .....	21
Yeo, J. Burney, <i>A Manual of Medical Treatment</i> ....	27



# Supreme Court of the United States,

OCTOBER TERM, 1923.

No. 245.

EDWARD AND JOHN BURKE, LIMITED,  
Appellant,

*vs.*

DAVID H. BLAIR, Commissioner of  
Internal Revenue, *et al.*,  
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

## Reply Brief for Appellant.

### I.

#### The fallacy involved in the Government's position.

The brief of the Government serves to bring into prominent relief the precise ground upon which it rests its case. This is the assertion that the express power of Congress to prohibit the manufacture, sale or transportation of intoxicating liquors for *beverage* purposes, carries with it the incidental power absolutely to prohibit the manufacture and sale of intoxicating liquors for *non-beverage* purposes as well. This proposition of law is most emphatically denied by the appellant, its contention

being that while Congress, in the exercise of its express power to prohibit the manufacture and sale of beverage liquors, has the incidental power to impose reasonable regulations upon the sale of non-beverage liquors, to prevent their use for beverage purposes, such regulations must stop short of the absolute prohibition contained in the Willis-Campbell Act.

The Government's contention, if carried to its full extent, would empower Congress, under its power to prohibit the sale of beverage liquors, likewise to prohibit, if deemed by it necessary, the sale of *all* non-beverage liquors, whether "for sacramental, scientific, pharmaceutical, industrial, or medicinal purposes." The means that this Court is asked to write into the Amendment, by judicial interpretation, a grant of *unlimited* power over intoxicating liquors, in place of the *limited* grant made by the States in ratifying the Amendment. The Court is asked to re-write the Amendment so as to make it read:

The manufacture, sale, or transportation of intoxicating liquors for beverage *and non-beverage purposes* is hereby prohibited.

The purpose of the Amendment and the end sought to be attained are entirely clear. When, in 1917, Congress directed that the proposed amendment be submitted to the States for their ratification, the outstanding purpose was to secure *uniform* national legislation to correct the evils of intemperance. The slogan was that the saloons must go. At that time some of the States had in force constitutional or statutory prohibition acts; in others, state-wide laws permitted the licensing of saloons, and in still others, local option laws were in force, so that saloons were lawful in portions of a given State and unlawful in others. It was evident that so long as

saloons continued to operate in one State, it tended to defeat the prohibition policy of an adjoining State; or if maintained in one county, it tended to defeat the prohibition policy of an adjoining county. Every one realized, therefore, that the evils of intemperate could not be satisfactorily and effectively remedied by State action. It was a subject matter which, by its very nature, could only be dealt with by national legislation, providing a uniform rule effective everywhere within the jurisdiction of the national government. The purpose of the Eighteenth Amendment, therefore, was to provide national legislation, with all the resources of the national government for its enforcement, which would completely outlaw the saloon, and put an effectual stop to the use of intoxicating liquors for beverage purposes.

There was no thought or purpose or intention on the part of any one to provide any uniform national rule upon the subject of intoxicating liquors for medicinal or other non-beverage purposes. This was a matter local to each State. Some States, in the exercise of their police powers, had prohibited the use of intoxicating liquors for non-beverage as well as for beverage purposes. Other States, and perhaps a majority of them, had pursued the policy of permitting, under reasonable restrictions, the use of non-beverage intoxicating liquors for various purposes. Each State was well within its rights in legislating as it deemed best for the interest of its own citizens. There was no reason for any uniform national rule upon this subject, and no demand for one.

In framing the Eighteenth Amendment to be submitted to the several States, Congress was careful to limit the grant of power, which it thereby sought, to the prohibition of intoxicating liquors for *beverage* purposes. It said, in substance, to the States: "We ask from you the constitutional power to enact laws prohibit-

ing the manufacture, sale, or transportation of intoxicating liquors for beverage purposes, which will effectively banish the saloon and cure the evils of intemperance. Each State will retain the right, which it has always possessed, in the exercise of its police power, to deal with non-beverage liquors in such manner as its own public policy may dictate."

Undoubtedly, the State legislatures, in ratifying the amendment, understood, as they were amply justified in believing, that, although they were granting to Congress a concurrent power to prohibit the manufacture and sale of intoxicating liquors for beverage purposes, they were at the same time reserving and retaining their own police powers over non-beverage liquors. The States had not been asked to surrender their legislative control over non-beverage liquors. It is scarcely conceivable that any State legislator, in voting to ratify the amendment, supposed he was voting for such a surrender. It is by no means certain that the amendment would have been ratified if the States had understood that they were surrendering all legislative control over *both* beverage and non-beverage liquors.

**The authorities relied upon by the Government do not sustain its position.**

It is respectfully submitted that the Government wholly overlooks the fact that its legislative power over intoxicating liquors is a *limited*, and not an unlimited power; that this subject matter, like the subject of commerce, has been divided between the Federal Government and the several States, each of which is supreme within its own domain.

The appellees (p. 10) point to the powers of the States effectively to prohibit the sale of intoxicating liquors for beverage purposes, and cite both State and Federal cases in support of the proposition.

No one at this time will deny the full and complete power of the several States to prohibit the manufacture and sale of intoxicating liquors of every description, and for any purpose. Their police powers not only permit but require legislation deemed beneficial to the inhabitants of a State, subject only to certain constitutional limitations. The distinguishing feature of this class of cases is that the power of the State is *unlimited*. It is a legislative domain in which the Federal Government has no share.

The case of *Purity Extract Co. v. Lynch*, 226 U. S. 192, cited by the appellees, is an illustration of the unlimited police power of a State, exercised in the interest of its citizens. There a statute of Mississippi prohibited the sale of a malt liquor called "Poinsetta", which was alleged to be non-intoxicating. This statute was upheld in this Court against the claim that its enforcement violated any of the guaranties contained in the Federal Constitution. The Court said that the power of a State to prohibit the selling of intoxicating liquors is unquestioned, and inasmuch as its control was complete, it had the right to adopt such means as it deemed wise to accomplish its purpose. The case is no support for the Government's position. If the Eighteenth Amendment had conferred upon Congress a complete and undivided power over intoxicating liquors, such as was possessed by the State of Mississippi (which, of course, is not the case), it could prohibit or regulate, as it saw proper, and it might then be plausibly contended that the Willis-Campbell Act would be a lawful exercise of authority. It is quite another thing to assert that Congress, having by

virtue of the Eighteenth Amendment control only over beverage liquors (which is only a *part* of the legislative power possessed by the State of Mississippi), could lawfully prohibit the sale of a non-intoxicating malt liquor called "Poinsetta", or any other non-beverage liquor. The power of a State, with its unlimited control, is quite different from the limited legislative power conferred on the Congress by the Amendment.

The appellees also assert that Congress, in passing the Willis-Campbell Act, was not restricted to mere regulation if the end sought could not be accomplished except by prohibition, and they point to *Ruppert v. Caffey*, 251 U. S. 264, and *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146. These cases do not, it is respectfully submitted, support the Government's contention. They are based upon the exercise by the Government of its war power. "The complete and undivided character of the war power of the United States is not disputable" (*Northern Pacific R. Co. v. North Dakota*, 250 U. S. 135; *Selective Draft Law Cases*, 245 U. S. 366). The Tenth Amendment is no obstacle to its exercise. During the existence of the war emergency and until a return to normal conditions, Congress had a complete, unlimited and undivided power over intoxicating liquors of every description, and for every purpose. The cases cited not only fail to sustain the position of the Government, but they serve to bring into prominence the vital difference between the legislative power of Congress when it possesses unlimited control of the legislative field, during a period of war, and the limited control which it now possesses under the Eighteenth Amendment.

The appellees also rely upon decisions upholding the power of Congress to legislate with respect to the use of intoxicating liquors in the Territories, and to prevent their introduction and sale among the Indian tribes.

But here, again, the power of Congress to legislate within the Territories is complete and unlimited; and likewise the power of Congress to enact laws for the protection of the Indians, who are wards of the Government (*U. S. v. Sandoval*, 231 U. S. 28; *Hallowell v. U. S.*, 221 U. S. 317), is unlimited and complete in itself. There is here no division of power between the Government and the States, as there is between beverage and non-beverage liquors, or between interstate and intrastate commerce.

It is argued, however, that the power to regulate includes the power to prohibit (p. 11), and reference is made to the *Lottery Case*, 188 U. S. 321. It is there held that the express power of Congress to regulate interstate commerce includes the power to prohibit the interstate transportation of lottery tickets. If the Eighteenth Amendment had contained an express grant of power to Congress to "regulate" non-beverage liquors, the argument would be more plausible. But the fact that the regulation of non-beverage liquors was reserved to and retained by the several States makes the argument inapplicable here.

The express power to "regulate" non-beverage liquors, it is respectfully contended, was denied to Congress when the Eighteenth Amendment was ratified. It is illogical, therefore, to insist that it exists as an incidental power. An incidental power can not be invoked to create powers which, expressly or by reasonable implication, are withheld; nor can it be invoked to enlarge powers actually granted, but only to carry into effect those which are granted. The latest expression of the Court in support of this proposition is *First National Bank v. Missouri*, decided January 28, 1924, where it is said:

But it is said that the establishment of a branch bank is the exercise of an incidental power conferred by Section 5136 R. S. by which national

banking associations are vested with "all such incidental power as shall be necessary to carry on the business of banking." The mere multiplication of places where the powers of a bank may be exercised is not, in our opinion, a necessary incident of a banking business, within the meaning of this provision. Moreover, the reasons adduced against the existence of the power substantively are conclusive against its existence incidentally; *for it is wholly illogical to say that a power which by fair construction of the statutes is found to be denied, nevertheless exists as an incidental power. Certainly, an incidental power can avail neither to create powers which, expressly or by reasonable implication, are withheld nor to enlarge powers given; but only to carry into effect those which are granted.*

An express power to "regulate" non-beverage liquors having been denied to the Federal Government, how can any incidental power to prohibit them be deemed to exist? The only incidental power which can arise from the express language of the Eighteenth Amendment is to carry it into effect, which, as above stated, is limited to reasonable regulations to prevent beverage liquors from being sold under the guise of non-beverage liquors. Such regulation must stop short of actual prohibition.

### **Limitations upon the incidental power of Congress.**

The fallacy of the Government's position that Congress is not restricted to regulation of non-beverage liquors, if absolute prohibition is necessary, may be shown by a consideration of Congressional legislation in aid of other constitutional provisions, where an appeal to the incidental power of Congress has proven unavailing.

The Thirteenth Amendment provides: "Neither slavery nor involuntary servitude \* \* \* shall exist within the United States, or any place subject to their jurisdiction"; and that "Congress shall have power to enforce this article by appropriate legislation." Here Congress is given a grant of power to prohibit slavery and involuntary servitude, in the same manner as by the Eighteenth Amendment it is given power to prohibit the manufacture, sale, or transportation of intoxicating liquors for beverage purposes. In each case the grant of power is to be enforced by "appropriate" legislation. The same grant of power to enforce by appropriate legislation is contained in the Thirteenth, Fourteenth, Fifteenth, Eighteenth and Nineteenth Amendments.

It is interesting to note the effect which might be given to the Thirteenth Amendment if the incidental power of Congress were as broad, extensive and comprehensive as claimed by the appellees. The amendment prohibits *involuntary* servitude. Voluntary servitude, inhering in the relation of master and servant, is a legislative subject matter withheld from Congress (with certain well recognized exceptions), and reserved to the several States. But many employments are for inadequate wages, and sometimes under conditions which approximate a state of involuntary servitude. May Congress exert its incidental power to the extent of regulating the relations of master and servant within the several States, in order to make effective its power to prevent involuntary servitude? The ruling of this Court in the first *Federal Employers' Liability Cases* answers this question in the negative. May Congress so exercise its incidental power as to regulate wages of employment where, in its judgment, they are so low as to approximate a condition of involuntary servitude? If so, a minimum wage law, enacted by Congress, would find support in

the incidental power of Congress to make effective the Thirteenth Amendment. But a minimum wage law did not find favor with this Court (*Adkins v. Children's Hospital*, 261 U. S. 525, decided April 9, 1923). It is to be noted that counsel in that case did not seek to support the act there under consideration by an appeal to the incidental power of Congress to make effective the constitutional provision against involuntary servitude.

The extent of the incidental power of Congress came before this Court in *Hodges v. United States*, 203 U. S. 1. There certain individuals were indicted under sections 1977 and 5508, Revised Statutes, for compelling negro citizens, by intimidation and force, to desist from performing their contracts of employment. The Government relied upon the incidental power of Congress under the Thirteenth Amendment, to support the statute. It argued, as appears from the opinion, that one of the disabilities of slavery, one of the *indicia* of its existence, was a lack of power to make or perform contracts, and that when the defendants, by intimidation and force, compelled the colored men named in the indictment to desist from performing their contract, they, to that extent, reduced those parties to a condition of slavery—that is, of subjection to the will of defendants, and deprived them of a freeman's power to perform his contract. It was held, however, that the United States Court had no jurisdiction of the wrong charged in the indictment, and that redress must be sought from the State Courts, under State laws. The Court said:

Notwithstanding the adoption of these three (*post bellum*) amendments, the national government still remains one of enumerated powers, and the 10th Amendment, which reads, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people,"

is not shorn of its vitality. True, the 13th Amendment grants certain specified and additional powers to Congress, but any congressional legislation directed against individual action which was not warranted before the 13th Amendment must find authority in it.

In the *Civil Rights Cases*, 109 U. S. 3, the Act of Congress of March 1, 1875, provided that all persons within the jurisdiction of the United States should be entitled to equal accommodations and privileges in inns, public conveyances, theatres and other places of amusement. Certain colored persons were denied the accommodations and privileges specified in the Act, and prosecutions were instituted. It was sought to sustain the Act by a resort to the incidental power of Congress to give effect to the Thirteenth Amendment. It was argued that a denial of equal accommodations and privileges to colored men amounted to a subjection to a species of involuntary servitude, within the meaning of the amendment, and that Congress had the right to enact all necessary and proper laws for the abolition and prevention of slavery, with all its badges and incidents, and, therefore, that Congress had the power, under the amendment, to pass the statute in question. The incidental power alleged to exist is thus stated by the Court (p. 20):

It is assumed that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States; and upon this assumption it is claimed that this is sufficient authority for declaring by law that all persons shall have equal accommodations and privileges in all inns, public conveyances and places of public amusement.

The Court denied the claim, and held the statute unconstitutional, saying, (p. 24) :

It would be running the slavery argument into the ground, to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business.

In the later case of *Butts v. Merchants Transp. Co.*, 230 U. S. 126, the Court, in referring to its holding in *Civil Rights Cases*, said that the statutes then under consideration, as applying to the States, were "unconstitutional and void because in excess of the power conferred upon Congress, and an encroachment upon the power reserved to the States respectively."

The Fifteenth Amendment provides, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous conditions of servitude"; and that "The Congress shall have power to enforce this article by appropriate legislation."

Here, again, it was claimed (*James v. Bowman*, 190 U. S. 127) that Congress possessed the incidental power, under the amendment, to punish individuals who, by means of bribery, prevented certain colored persons, to whom the right of suffrage was guaranteed by the amendment, from exercising that right. It was held, however, that section 5507, Revised Statutes, therein invoked, could not be sustained as a proper exercise of the power granted to Congress by the amendment.

Again, the Sixteenth Amendment confers upon Congress the "power to lay and collect taxes upon incomes, from whatever source derived, without apportionment among the several states, and without regard to any

census or enumeration." The States, also, by virtue of their sovereignty, have the power, normally pertaining to governments, to resort to all reasonable forms of taxation in order to defray governmental expenses, and this includes the right to impose a tax upon the income of residents and non-residents alike (*Shaffer v. Carter*, 252 U. S. 37, 50). Here are two distinct powers of taxation, one residing in the general government, and the other in each of the several States. Each is supreme in its own domain, and neither can encroach upon the other. The Federal Government possesses the incidental power to pass the legislation necessary to render effectual its power of taxing incomes; but no one would contend that this incidental power can extend so far as to prohibit the several States from assessing and collecting their own income taxes. If, for illustration, Congress should decide that the Federal Government needed the income taxes assessed by the several States, as well as those assessed by its own authority, and should pass an act increasing the Federal income tax of every citizen in the United States by the amount of the income tax assessed against him under State authority, and prohibiting him from paying that assessment to the State authorities, would any one contend that such an enactment did not transcend the lawful power of Congress?

Counsel admit (p. 11) that in enacting the Willis-Campbell Act, Congress "may have gone to the extreme extent of its power." It is difficult to see how Congress could have gone farther than it did with respect to the use of malt liquors for medicinal purposes. True, it might have gone farther and prohibited the use of intoxicating liquors of every kind and description for medicinal, sacramental and industrial purposes. If Congress, acting under its incidental power, can prohibit the use of intoxicating liquors for one non-beverage

purpose, it can prohibit their use for all non-beverage purposes. But this would be equivalent to saying that the existence of the incidental power is sufficient to create an express legislative power over non-beverage liquors, which the States and the people, in ratifying the Eighteenth Amendment, withheld from Congress and left with the States, where it had always resided. Legislative power legitimately belonging to the several States can not be appropriated by Congress in this manner.

## II.

### **There is no justification for the statement in appellee's brief that stout possesses no therapeutic value.**

It is asserted in the appellees' brief (p. 9) :

Congress determined that malt liquors have no therapeutic value and are no remedy of any sort for any kind of disease whatsoever; that they serve no medicinal purpose which can not satisfactorily be met in other ways.

For support of this statement, reference is made to proceedings before Congress, reports to the Prohibition Unit, and to the alleged number of physicians of the country who prescribe no liquors whatsoever, and to other matters outside of the record. Without in any way waiving the well-settled rule that matters of fact alleged in the bill are deemed to be true upon demurrer or motion to dismiss, we proceed to point out that there is no justification for the statement.

It appears in *Lambert v. Yellowley*, 291 Fed. 640, 642, that a questionnaire was directed to upwards of 30,000 physicians to secure their opinion as to whether or not

the use of liquor in the treatment of certain known ailments is a valuable therapeutic agent. Of this number, 51 per cent. declared whiskey to be necessary in the treatment of certain diseases, and 49 per cent. took a contrary view. In the same opinion reference is made, at page 644, to the fact that 22 states permit the use of intoxicating liquors for medicinal purposes.

Nowhere in the Willis-Campbell Act is there any finding, direct or indirect, that stout, or any other malt liquor, is not a valuable therapeutic agent. Had Congress desired to make a finding of that nature, presumably it would have done so in plain, unambiguous words. Congress contented itself with making it a criminal offense for physicians to prescribe malt liquors, including stout, for their patients.

It is further argued that the Willis-Campbell Act expresses the legislative judgment of Congress that the prohibition of the use of malt liquors for medicinal purposes was necessary to make effective its constitutional power over beverage liquors. It will be found, however, that there is nothing in the legislative history of the Act which supports this argument. The report of the Senate committee recommending the passage of the Act is illuminating. So much (Report No. 201, 67th Congress, 1st Session) as bears upon the matter in question is as follows:

Section 2 is altogether the most important section of the bill and is rendered necessary by the opinion of the former Attorney General, relative to the right, under the national prohibition act, to prescribe beer or wine for medicinal purposes. Without question the obvious effect of the interpretation put upon the law by the Attorney General would be to permit physicians to prescribe either beer or wine for such purposes, and the unfortunate feature of such interpretation is that

*if such liquors can be prescribed at all they can be prescribed in unlimited quantities,* and if this can be done the prohibition law will in large measure be nullified. Under the interpretation of the Attorney General, with which there is no disagreement by the committee, the Commissioner of Internal Revenue is now contemplating the issuance of regulations governing the manufacture of beer for medicinal purposes, and this fact adds emphasis to the need of enacting this proposed legislation at the earliest possible day.

Section 2 has the effect of prohibiting the use of beer for medicinal purposes and limits the amount of the alcohol in any vinous liquor which may be so prescribed or sold for medicinal purposes to 24 per cent by volume, and limits the amount of alcohol which may be prescribed for any person within any period of 10 days, whether the same be contained in vinous or spirituous liquors, or both, to one-half pint. This leaves physicians the right to prescribe either spirituous or vinous liquor, with specific limitation as to the quantity of liquor and the alcoholic contents thereof.

It will be noted that the report states "Section 2 has the effect of prohibiting the use of *beer* for medicinal purposes", etc. Stout is not mentioned in the report, and there is no indication that the committee intended to condemn its use for medicinal purposes.

The matters which moved the committee to recommend the passage of the bill were the fact that the National Prohibition Act, in the opinion of the Attorney General, permitted physicians to prescribe either beer or wine for medicinal purposes, and the "unfortunate feature" was that the law did not place any limit upon the quantities of beer and wine which might be so prescribed. Therefore, some legislation, presumably imposing a limit upon the quantity of beer or wine which might be prescribed, was necessary.

The plain remedy which the situation suggested was to place a limitation, by Congressional action, upon the amount of beer or wine which might be lawfully prescribed; but instead of so doing, the recommendation of the committee was that the use of beer for medicinal purposes be absolutely prohibited, and a limitation placed upon the amount of wine that might be prescribed. The prohibition was aimed at beer, and was a clear *non sequitur* from the "unfortunate feature" which the opinion of the Attorney General made apparent.

There is no suggestion in the committee's report that either beer or wine was not a medicinal agent, nor is there any suggestion that it was necessary to outlaw malt liquors, including stout as well as beer, in order to prevent beverage liquors from being sold in violation of law. There is a strong and compelling inference to the contrary. Both wine and beer, it is pointed out, can be prescribed, under the National Prohibition Act, in unlimited quantities. Logically enough, the committee recommended that a restriction be placed upon the amount of wine which could lawfully be prescribed.

Why could not a similar restriction be placed upon the use of malt liquors, for the same purpose? If one may be regulated, why may not the other also be regulated? It must be apparent to anyone that by reason of its greater bulk and weight, the clandestine and illegal dealing in stout, or other malt liquor, is much more difficult and more liable to discovery than is the case with wine. The difference in their treatment was arbitrary and illogical in the face of the report. Certainly, there is no justification whatsoever for the claim that Congress, in so far as its action may reflect the report of the Senate committee, found it necessary to place a ban upon the use of all malt liquors for medicinal purposes in order to prevent beverage liquors from coming into unlawful use.

Nor is there anything in the report of the House committee (Report No. 224, 67th Congress, 1st Session) which sustains the argument that Congress deemed prohibition of the use of stout for medicinal purposes as necessary to make effective its power over beverage liquors. So much of the reports as refers to the matter under consideration is as follows:

Section 2 prohibits the use of beer as medicine and limits the alcoholic strength and the quantity of wine that may be prescribed. • • •

The evidence presented to the committee to the effect that beer has never been recognized as a medicine was overwhelming. The United States Pharmacopoeia has never listed it as a medicine.

One hundred and four of the leading physicians and scientists in the Nation signed the following statement:

The undersigned physicians of the United States desire to place on record their conviction that the manufacture and sale of beer and other malt liquors for medicinal purposes should not be permitted. Malt liquors never have been listed in the United States Pharmacopoeia as official medicinal remedies. *They serve no medicinal purpose which can not be satisfactorily met in other ways*, and that without the danger of cultivating the beverage use of an alcoholic liquor.

Several thousand other physicians signed the above, or a similar statement, and presented it to the committee.

Here, again, it is stated that "Section 2 prohibits the use of beer as medicine", etc. Stout is not mentioned in the report.

The significant statement in the foregoing report is that malt liquors "serve no medicinal purpose which can not be satisfactorily met in other ways". This is very

far from saying that they have no therapeutic value; on the contrary, the statement is that they do possess a recognized therapeutic value, but that, in the opinion of many persons, other medicines may preferably be used as a substitute.

Congress, in passing the Act, was in the attitude of deciding between two recognized therapeutic agents, in so far as the Act may be said to reflect the opinion of the committee. It said, in effect, that malt liquors are recognized therapeutic agents, but that there are other therapeutic agents equally good which should be used as a substitute. The physician, therefore, shall not be permitted to make his choice as heretofore; he may not prescribe malt liquors for his patient, even though, in his informed judgment, such a course may be for the patient's welfare, but must, under the compulsion of heavy penalties, prescribe a substitute. Thus, Congress is permitted to invade the domain of medical science and decide for the physician what remedies he shall prescribe.

### III.

#### **Stout is recognized as a valuable therapeutic agent by standard medical authorities.**

It is said by counsel (p. 7) that only one physician appeared before the committee in advocacy of malt liquors as a medicine, and that his attitude was promptly repudiated by the Medical Society of the State of New York.

The inference is thus sought to be created that the medical fraternity does not recognize stout as a remedial agent; but this is far from accurate. In the library of the Academy of Medicine of New York City there are

many standard works which recognize the therapeutic value of malt liquors generally, and of stout in particular. In some instances, for reasons given, superior efficacy is ascribed to them over vinous or spirituous liquors. A few extracts from these medical works will be given, not for the purpose of showing that stout is a therapeutic agent, since that stands admitted by the pleadings, but for the purpose of showing that the inference sought to be conveyed by counsel is wholly unwarranted.

Robert Hutchinson, M.D. (Edinburgh; F.R.C.P. Physician to the London Hospital, with charge of outpatients to the Hospital for Sick Children, Great Ormond Street; author of "Lectures on Diseases of Children", "Patent Foods and Patent Medicines", "Applied Physiology", joint author of "Clinical Methods") says (p. 369, *Food and Dietetics*, 4th Edition, 1916) :

Stout is popularly believed to be more "digestible", and perhaps rightly, but bottled stout is an admirable soporific. "If it be desired to avoid nervousness", says Hutchinson, "and to get rid of insomnia, shun tea and coffee, and drink Guinness's stout. \* \* \* I scarcely ever met with a man who could withstand the soporific effects of bottled stout. It is far better than opium, and induces a more nearly natural sleep."

The large quantity of carbohydrate matter in malt liquors renders them the most truly nourishing of alcoholic drinks. A pint of good ale contains as much carbohydrate as 1-1/5 ounces of bread.

In *Modern Materia Medica and Therapeutics*, by A. A. Stevens, A.M., M.D., it is said (p. 598, 5th Ed., 1909) :

DISEASES OF THE RESPIRATORY SYSTEM.—Catarhal Pneumonia. \* \* \* Medicinal Treatment. \* \* \* Alcohol is useful in some cases, but not in

all. Each case must be carefully considered by itself. The danger of inducing the alcoholic habit must also be borne in mind. Malt liquors and wines are usually the best preparations when digestion is good, but when the digestive power is feeble whisky or brandy, well diluted is preferable. Alcohol is best given with the food.

In *Dietetics*, by William Tibbles, L.L.D., M.D., Chicago, L.R.C.P., Edin., M.R.C.S., England, L.S.A., London Medical Officer of Health, Fellow of the Royal Institute of Public Health, Etc., Author of "Food and Hygiene", "Foods:: Their Origin, Manufacture, and Composition", "Diet in Dyspepsia", "The Theory of Ions", etc., 1914, the author says, at page 257:

Beer, ale, and stout, by virtue of their taste, aromatic bitters and tonics, give a relish to food, increase appetite, and promote the flow of saliva. To this extent they assist digestion. They are useful to convalescents, those enfeebled by chronic diseases, and the aged. They are of some value to those whose occupation is sedentary, whose stomach has lost tone by overwork, rush, and worry, and to sufferers from neuralgia and insomnia. The limit should be 1 pint a day. They are contra-indicated in neurotic conditions, diabetes, gout, rheumatism, obesity, and genito-urinary diseases.

In *Foods and Diets*, by Robert F. Williams, M.A., M.D., Professor of Practice of Medicine in the Medical College of Virginia, 1906, the author says, at page 270:

Good beer, porter, or ale is permissible when it is preferred by the patient, especially in warm weather, and it is often more efficient than wines or spirits in stimulating the appetite. It is useful, also given at bedtime, for preventing sleeplessness.

In *Principles of Hygiene*, by D. H. Bergey, A.M., M.D., Dr. Ph., Assistant Professor of Hygiene and Bacteriology, University of Pennsylvania, 7th Edition, Revised 1921,—the author says, at p. 224:

Physiologic experiments have demonstrated that the alcoholic beverages may be regarded as food, not only on account of the quantity of alcohol present, but also on account of the extractives which they contain. They serve to stimulate digestion and the nervous system. They also diminish the oxidation process of the body and lower the temperature. Small amounts of alcohol may be taken daily in the food, and, according to Professor Atwater's experiments, these small amounts are oxidized in the system and are therefore a source of energy.

In *Materia Medica and Therapeutics* by Reynold Webb Wilcox, M. A., M.D., LL.D., D.C.L., President of the American College of Physicians, Professor of Medicine (Retired) at the New York Post Graduate Medical School and Hospital, Consulting Physician to St. Marks, to the Nassau, to the Ossining, and to the Eastern Long Island Hospital; President of the Congress on Internal Medicine, Honorary Member of the Connecticut State Medical Society, Fellow of the American Academy of Medicine, Member of the Association of Military Surgeons and of the American Association for the Advancement of Science; formerly President of the American Therapeutics Society, of the Medical Association of the Greater City of New York, of the Society of Medical Jurisprudence, and of the Association of the Medical Reserve Corps, United States Army, 10th Edition, Revised in accordance with the United States Pharmacopoeia, 1917, the author says at page 538:

As malt liquors contain malt extract as well as hops, and aromatic bitters, their nutritive, tonic

and stomachic qualities are greater than those of spirits or wine.

In *Materia Medica and Therapeutics, with Special Reference to the Clinical Application of Drugs*, by John V. Shoemaker, M.D., LL.D., Professor Materia Medica, Pharmacology, Therapeutics, and Clinical Medicine, and Clinical Professor of Diseases of the Skin in the Medical Chirurgical College of Philadelphia; Physician to the Medical Chirurgical Hospital, Member of the American Medical Association, of the Pennsylvania and Minnesota State Medical Societies, American Academy of Medicine, British Medical Association, Fellow of the Medical Society of London, 7th Edition, 1908, the author says, at p. 169-170:

Malt liquor—ale, beer, porter, etc—are produced by fermentation of malt and hops and contain nutritive material, together with a small proportion of diastase which makes them useful in certain cases of weak digestion. They contain only from 6 to 10% alcohol. Malt liquors can be taken by those who suffer from the cerebral effects of wine, but to some they are unpleasant in their effect upon the brain, owing to the oil of hops which they contain (Rossbach).

In *Principles of Medical Treatment*, by George Cheever Shattuck, M. D., A.M., Assistant Professor of Tropical Medicine, Harvard Medical School, formerly Assisting Physician, Massachusetts General Hospital,—5th Revised Edition, 1921, the author says, at p. 291:

\* \* \* Beer, ale, porter, or malt may be prescribed with meals to improve appetite and to promote increase of weight.

Chalmers Watson, M.D. F.R.C.P.S., Assistant Physician, Royal Infirmary, Edinburgh, Editor of the En-

cyclopedia Medica, Second Edition, 1913, says (p. 152-153) :

In acute diseases \* \* \* a glass of beer or stout, given with one or two meals daily for a time, is occassionally of distinct value, acting as a bitter tonic and at the same time supplying a relatively large amount of nutriment in a fluid form.

In protracted convalescence from some acute diseases, a glass of beer, a little whiskey in water, or a glass of wine, taken with chief meals, may improve digestion and accelerate the road of recovery. The advantages of these are best seen in some cases of influenza.

In *The Practitioner's Encyclopedia of Medical Treatment*, edited by W. Langdon Brown, M.D., F.R.C.P., Assistant Physician to St. Bartholomew's Hospital and Physician to the Metropolitan Hospital, and J. Keogh Murphy, M.C., F.R.C.S., Surgeon to the Miller General Hospital for South East London and to Paddington Green Children's Hospital, 1915, it is said (p. 104) :

*Treatment of Septicaemia.*—The patient must be encouraged to take as much food as possible. \* \* \* It should be remembered that a high temperature alone is no contraindication to a liberal diet and if the patient will take them, fish and chicken may be allowed throughout with a small quantity of alcohol, either as brandy (three ounces), or stout, or port wine.

In *Practical Therapeutics*, Hobart Amory Hare, M.D., B.Sc., Professor of Therapeutics, Materia Medica and Diagnosis in the Jefferson Medical College of Philadelphia; Physician to the Jefferson Medical College Hospital; one-time Clinical Professor of Diseases of Children in the University of Pennsylvania; Surgeon, U.S.N.R.F., 1919, says, at p. 81:

Stout and porter are of value in wasting diseases, in convalescence from acute diseases and for nursing women.

In *Sajous's Analytical Cyclopedia of Practical Medicine*, by Charles E. de M. Sajous, M.D., LL.D., assisted by Louis T. de M. Sajous, B.S., M.D., with the active co-operation of over 100 associate editors, 7th Ed., 1913, Volume 1, at page 509, it is said:

Malt liquors (beer, ale, brown stout, porter) contain less alcohol, but have greater nutritive value than any other of the alcoholic beverages.  
 \* \* \* When the digestive powers are but little impaired, beer is valuable as a tonic and nutritive.  
 \* \* \* The low percentage of alcohol content in beer renders it useful where the patient appears specially sensitive to the action of alcohol in the cerebrum.

In *Materia Medica Pharmacology & Therapeutics*, by Walter A. Bastedo, Ph. G. M.D., Assistant Professor of Clinical Medicine Columbia University, Associate Attendant Physician St. Luke's Hospital, N. Y.; Attending Physician City Hospital, N. Y.; Consulting Physician St. Vincent's Hospital, Staten Island; Consulting Gastro-enterologist Staten Island Hospital; Fifth Vice-President U. S. Pharmacopoeia Convention; formerly Curator of the New York Botanical Garden, 2nd Ed. 1918, the author says at p. 324:

Hence alcoholic drinks which promote the appetite, whether palatable wines or bitter malt liquors, have a distinct influence in the production of the psychic secretion or appetite gastric juice, and so may favor digestion.

In *Diet for the Sick*, by H. Edwin Lewis, M. D., formerly instructor chemistry and dietetics Fanny Allen

Hospital Training School for Nurses; formerly attending surgeon, Fanny Allen Hospital, Burlington, Vermont; formerly attending physician, New York Nose, Throat and Lung Hospital; member New York State Medical Society, American Medical Association, etc.; Third Edition Revised, 1915, p. 54, the author says:

Ale, stout, porter and beer have a special tonic effect and the diastase which they contain aid the digestion of starchy foods.

In *Materia Medica and Therapeutics*, by Roberts Bartholow, Professor Emeritus of Materia Medica, General Therapeutics and Hygiene in Jefferson Medical College, Philadelphia, formerly Professor of Materia Medica and Therapeutics and of the Practice of Medicine in the Medical College of Ohio; Fellow of the College of Physicians of Philadelphia;—member of the American Philosophical Society; Honorary Fellow of the Royal Medical Society of Edinburgh; Honorary Member of the Societe Medico Pratique de Paris; author of a treatise on the practice of medicine, of a treatise on the practice of electricity, of a manual of Hypodermatic Medication, of the Russell and Jewett Prize Essays and the Prize Essay of the American Medical Association and of the Rhode Island Medical Society, Twelfth Edition, 1906, the author says, at p. 583:

So far as alcohol is concerned, beer, ale and porter correspond in physiological action to the spirituous liquors and wines. As they contain malt extract, their nutritive value is greater than spirits and wines. An important constituent, the hop, being an aromatic bitter, the tonic and stomachic qualities of these malt liquors are also greater than their congeners. \* \* \* Beer, ale and porter are not usually prescribed in acute maladies. They are, however, much and justly es-

teemed as stomachic tonics and restoratives in chronic wasting diseases—for example, in convalescence from acute diseases and surgical injuries, in cases of acute and protracted suppuration, prolonged lactation, diseases of the joints, scrofula, phthisis. \* \* \*

When wakefulness is due to cerebral anaemia, a glass of beer or ale at bedtime will frequently produce satisfactory sleep. Puerperal mania, delirium tremens, and acute maniacal delirium, when these symptoms co-exist with a condition of adynamia, are greatly benefited by the liberal use of ale (pale or Edinburgh ale). The effect of this remedy is to arouse the appetite, to quiet delirium, and to produce sleep. In melancholia, excellent results are often obtained by the use of porter, with a little tincture of opium.

In *A Manual of Medical Treatment*, by J. Burney Yeo, M.D., F.R.C.P., Emeritus Professor of Medicine in King's College, London; consulting physician King's College Hospital; Hon. Fellow of King's College, Fifth Edition by Raymond Crawfurd, M.A., M.D., Oxon., F.R.C.P., Physician and Lecturer on Clinical Medicine to King's College Hospital; Fellow of King's College, London; Examiner in Medicine, Royal College of Physicians; late examiner in *Materia Medica* and Pharmacy, University of London, and E. Farquhar Buzzard, M.A., M.D., Oxon., F.R.C.P., Physician for Out-patients to St. Thomas's Hospital and to the National Hospital for the Paralyzed and Epileptic, Queen's Square; Consulting Neurologist to the Royal Free Hospital and to the Hospital for Diseases of the Throat, Golden Square; Late Physician to the Belgrave Hospital for Children, and Goulstonian Lecturer, Royal College of Physicians, etc., 1913, it is said at p. 498:

The treatment of chlorosis and the anaemic state will be best considered from the three points

of view—one, dietetics; two, hygienic; and three, medicinal. *One*—Diet—Defective or unsuitable food is one of the most frequent causes of anaemia. \* \* \* Food must be presented to such patients in an attractive and palatable form, especially when there is great indisposition to take food from entire loss of appetite. Simple, easily digested farinaceous foods must be given to supplement the diet: our object should be to depart as little as possible from the normal mixed dietary of the healthy adult. A certain amount of wine, such as good Burgundy, with or without water, should be useful both as a stimulant or a sedative; or a glass of porter or stout may sometimes be taken with advantage at bedtime with a biscuit or some bread and butter.

In an address on "*Alcohol as a Therapeutic Agent*", delivered at the 79th Annual Meeting of the Lancashire & Cheshire Branch of the British Medical Association, held in Liverpool June 28, 1905, Sir James Barr, M.D., F.R.C.P., F.R.S., Edin., President of the Liverpool Medical Institution, and of the Lancashire & Cheshire Branch of the British Medical Association; physician, Liverpool Royal Infirmary; Lecturer on Clinical Medicine, Liverpool University, said:

Personally, I would rather have a glass of stout as a soporific than any of those depressing sulphur compounds which German manufacturers so diligently foist on the public. \* \* \* Almost the only use for alcohol in pneumonia is as a soporific, and when given for this purpose I prefer a light draught beer or stout containing about 4 or 5% of alcohol.

In a paper on "*The Effects of Alcohol on the Gastro-intestinal Tract*" by William J. Mallory, A.M., M.D., Washington, D. C., Associate in Medicine, George Washington University Medical School, read before the Amer-

ican Therapeutic Association at its Annual Meeting, June 3, 1921, Washington, D. C. (Medical Records, Vol. 100, p. 275, Aug. 13, 1921), it was said:

From the facts presented and their relation to human physiology, it is a reasonable deduction that alcoholic beverages have certain applications in the treatment of diseases in which it is desired to influence the gastrointestinal tract. \* \* \*

Therapeutic use and contraindication must be determined here as elsewhere by the physician who has diagnosed the particular case but a statement of certain principles with examples of application may be given.

In any case, where it is desired to awaken or stimulate the appetite one of the wines or malt drinks would be an aid and the dose of beverage used for such a stimulant would not contain a sufficient quantity of alcohol to fall under any of the contraindications hereinafter mentioned.

In his book on *Dietotherapy*, William Edward Fitch, M.D., Major, M.R.C., U. S. A., says (Vol. 1, 1918, p. 566) :

Stout and porter are popularly believed to be more digestive. "If it is to be desired to avoid nervousness", says Hutchison, "and to get rid of insomnia, shun tea and coffee and drink stout."

In *Diet in Health and Disease*, by Julius Friedenwald, M.D., and John Rohrah, M.D., it is said (5th Ed., 1919, p. 196) :

Malt liquors, when taken in moderate quantities, seem to aid digestion, increase the appetite and stimulate gastric secretion.

In *Pharmacology and Therapeutics, or the Action of Drugs*, Arthur R. Cushny, M.A., M.D., LL.D., F.R.S., Professor of Pharmacology in the University of London, Examiner of the Universities of London, Manchester,

Oxford, Cambridge, Glasgow and Leeds; formerly Professor of Materia Medica and Therapeutics in the University of Michigan says (7th Ed., 1918, p. 195):

In chronic conditions of cachexia and loss of flesh in general and during the convalescence, alcoholic preparations are then advised simply as foods, and in these cases the ales, beers and porters are generally to be preferred to the others, provided always that the stomach is not irritated by them as they contain other food constituents and value in general to alcohol.

Alcohol is of value as a mild hypnotic, a comparatively small quantity taken before retiring being even sufficient to secure quiet and refreshing sleep. Beer or spirits in water is generally used for this purpose.

In *Practical Dietetics, with Special Reference to Diet in Diseases*, W. Gilman Thompson, M.D., Professor of Medicine in Cornell University Medical College of New York City, Visiting Physician to the Presbyterian and Bellevue Hospitals, says (4th Ed., 1909, p. 272):

When porter, ale or stout do not derange the stomach, they may be drunk advantageously by women who are weakened by prolonged suckling.

In *The Dispensatory of the United States of America*, 20th Edition, Remington and Wood, 1918, indexed under the head of "Malt Liquors", occurs the following:

MALT—is not itself used directly in medicine, but is official as the basis of Malt Extract. From it are also prepared the so-called Malt Liquors by making an infusion (wort) of the bruised malt, adding hops and various other substances, and fermenting. Ale, Brown Stout and Porter are made by rapid fermentation at a comparatively high temperature, 23.8 degrees C. (75 degrees F), while Lager Beer is prepared by a very slow and prolonged fermentation at a low temperature.

It is not, of course, contended that the medicinal use of stout or any other malt liquor is advocated or conceded by all members of the medical fraternity. The same may also be said of vinous and spirituous liquors, which the National Prohibition Act and the Willis-Campbell Act expressly permit to be prescribed. There is great diversity of opinion with respect to the use of any form of intoxicating liquor; and this is particularly true since prohibition became a political issue in this country and elsewhere. Certain it is that there is no universal condemnation by physicians of the use of stout or other malt liquors for medicinal purposes, as counsel for the appellees have intimated in their brief. The contrary position is maintained by many eminent writers of high authority.

#### IV.

##### **The Government's answer to appellant's claim under the Fifth Amendment is not convincing.**

It is gravely asserted by counsel for appellees (p. 22) that Congress was moved to pass the Willis-Campbell Act upon the representation "that if malt liquors were permitted as a medicine it would be impossible to enforce prohibition."

The evident meaning is that while rigid regulations and an efficient body of enforcement officers would easily prevent vinous and spirituous liquors, intended for medicinal use, from getting into illegitimate channels, the Government would be powerless similarly to police stout and other malt liquors. This can only be upon the theory that the less the alcoholic content and the conse-

quent greater bulk and weight of a contraband package, the more difficult the task of the guardians of the law in discovering it, apprehending it, and retiring it from circulation. On this theory—to take an illustration from the daily police records, a pint flask of high-proof spirits, obtained for medicinal purposes and carefully concealed in a hip pocket, and intended for illegal and surreptitious use at some restaurant or elsewhere, could be easily detected by the enforcement officers and the culprit promptly punished; but that a case of stout or other malt liquors, consisting of twelve quart bottles and containing an equal amount of alcohol, issued for medicinal purposes, could be carried on the person or otherwise transported, and illegally used for beverage purposes, and the discovery and punishment of the culprit would present a problem of such insuperable difficulty that prohibition must totally fail unless the use of all malt liquors for medicinal purposes be absolutely prohibited.

Every one knows that the contrary is true. The public press is filled with accounts of violations of the National Prohibition Act. It is well known that smugglers, bootleggers and other violators of the law confine their activities to vinous and spirituous liquors. The police records and reports of prohibition enforcement officers will be searched in vain for any instance where stout has been imported, manufactured, sold, or transported, for either beverage or non-beverage purposes, in violation of law. The same is largely true of all malt liquors. If stout or other malt liquors are not now the subject of illegal sale for beverage purposes, to any considerable extent, how is it conceivable that their use for medicinal purposes, if that were permitted under the rigid safeguards of the law, would so enormously increase their use for beverage purposes as to defeat the

enforcement of prohibition? The position of the Government seems to be that although the law which prohibits the sale of stout has been strictly enforced, nevertheless a permitted sale for medicinal purposes would create and stimulate a new demand for beverage use not previously existing, or new opportunities for evading the law, so that it "would be impossible to enforce prohibition."

It is further said by counsel for appellees (p. 22) that "From the large number of breweries which had filed applications for permits to manufacture malt liquors it was apparent that their product would be forced into illegitimate channels." This, of course, refers to domestic beer, and not to imported stout; but, even so, how can the conclusion follow from the premise, except upon the assumption that physicians to whom the prohibition enforcement officers, in their discretion, should entrust permits to prescribe intoxicating liquors, and the enforcement officers themselves, would wilfully and corruptly violate their duties? Even upon this assumption, why are they likely to be more corrupt in the case of malt liquors than in the case of vinous and spirituous liquors?

Due process of law guarantees to every one a certain minimum of protection; a freedom from the arbitrary exercise of the powers of government, and, in general, the enjoyment of the "rudiments of fair play." This guaranty, we respectfully submit, is violated in the present case, in that the complainant, and others in its unfortunate predicament, have been singled out from all other dealers in intoxicating liquors for medicinal purposes, and subjected to arbitrary and unreasonable restrictions. All intoxicating liquors for medicinal purposes should, in a spirit of fair play, be given the same treatment, unless there are some real and substantial

grounds for believing that the enforcement problem presents insuperable difficulties with respect to malt liquors but not with respect to vinous and spirituous liquors. But it is apparent to any one that the enforcement problem with respect to malt liquors is vastly more simple than with respect to vinous and spirituous liquors. Yet the Willis-Campbell Act is based upon an assumption precisely to the contrary; and in that fact lies the unlawful discrimination of which the appellant complains.

With respect to the claim of appellant that it was entitled to compensation for the loss which it would sustain to its stock of stout on hand when the Willis-Campbell Act was passed and became effective, counsel for appellees state (p. 24) that this claim has been disposed of contrary to our contention, citing the *Mugler*, *Hamilton* and *Ruppert* cases, decided by this Court.

These cases, however, do not touch the precise question in issue. The Willis-Campbell Act became effective immediately, without any period of grace, and prohibited that which the National Prohibition Act had expressly permitted. The stock of stout then on hand could not be sold in this country or transported for export and sale elsewhere. It was virtually confiscated by legislative fiat. This Court has not decided that this may lawfully be done.

There were periods of grace in each of the cases cited by appellees. In the *Mugler* case, the period extended from November 2, 1880, when the constitutional amendment was adopted, beyond February 19, 1881, when the enforcement act was passed, which did not take effect until May 1, 1881. In the *Hamilton* case, there was, as stated by the court in its opinion, a period of seven months and nine days from the passage of the Wartime Prohibition Act within which the owner could dispose of his stocks, free from any restrictions imposed

by the Federal Government. In the *Ruppert* case, the stock of beer on hand had not been manufactured under lawful authority. The court said:

The statement of the plaintiff that the 2.75 per cent beer on hand was manufactured under permission of the President is wholly unfounded.

The same may be said of the recent case of *Corneli v. Moore*, 257 U. S. 491, which referred only to beverage liquor. There ample opportunity was afforded from the ratification of the Eighteenth Amendment, in January, 1919, to the effective date of the Volstead Act, a year later. In all of these cases, there was a period of grace or adjustment within which the owner of the intoxicating liquor affected could lawfully dispose of it, or otherwise minimize his loss.

But the Willis-Campbell Act afforded no such opportunity to dispose of stocks on hand at its effective date, or to reduce the loss which was inevitable; and in that fact lies our claim that with respect to the stock of stout on hand, the Act operated to deny to appellant due process of law. The precise question was passed upon in *Falstaff v. Allen*, 278 Fed. 643, where the court held that the Willis-Campbell Act was a denial of due process of law with respect to stocks of malt liquors lawfully on hand at its effective date. The court there said (p. 649):

When this matter was first presented, and this bill filed, complainant, as it was averred, had on hand a large quantity of beer, which it had made pursuant to permit regularly issued to it. This permit had been issued under the opinion of the Attorney General of the United States, who construed the then existing law as allowing the making and sale of beer for medicinal purposes. Certain of the defendants, upon the passage of the

Act of November 23, 1921 (which outlawed a large quantity of beer thus made and held by complainant), were threatening to destroy the same unless complainant dealcoholized it at once. In either contingency complainant (which had done nothing except to honestly and fairly follow the law as interpreted by the highest non-judicial legal authority in the United States) would have been subjected to loss of its property. To prevent such loss, which, in my view, *would have been tantamount to taking the property of complainant without due process of law*, a temporary restraining order pending further hearing was granted to afford opportunity to complainant to avoid, if possible, and if so advised, the contingent loss. It is scarcely conceivable that Congress would have passed the amendment of November 23, 1921, without providing certain days of grace before the act went into effect, if it had been advised of the situation existing. Be this as may be, it seemed only fair to temporarily stay the action threatened until the case could be presented on its merits, and this was done.

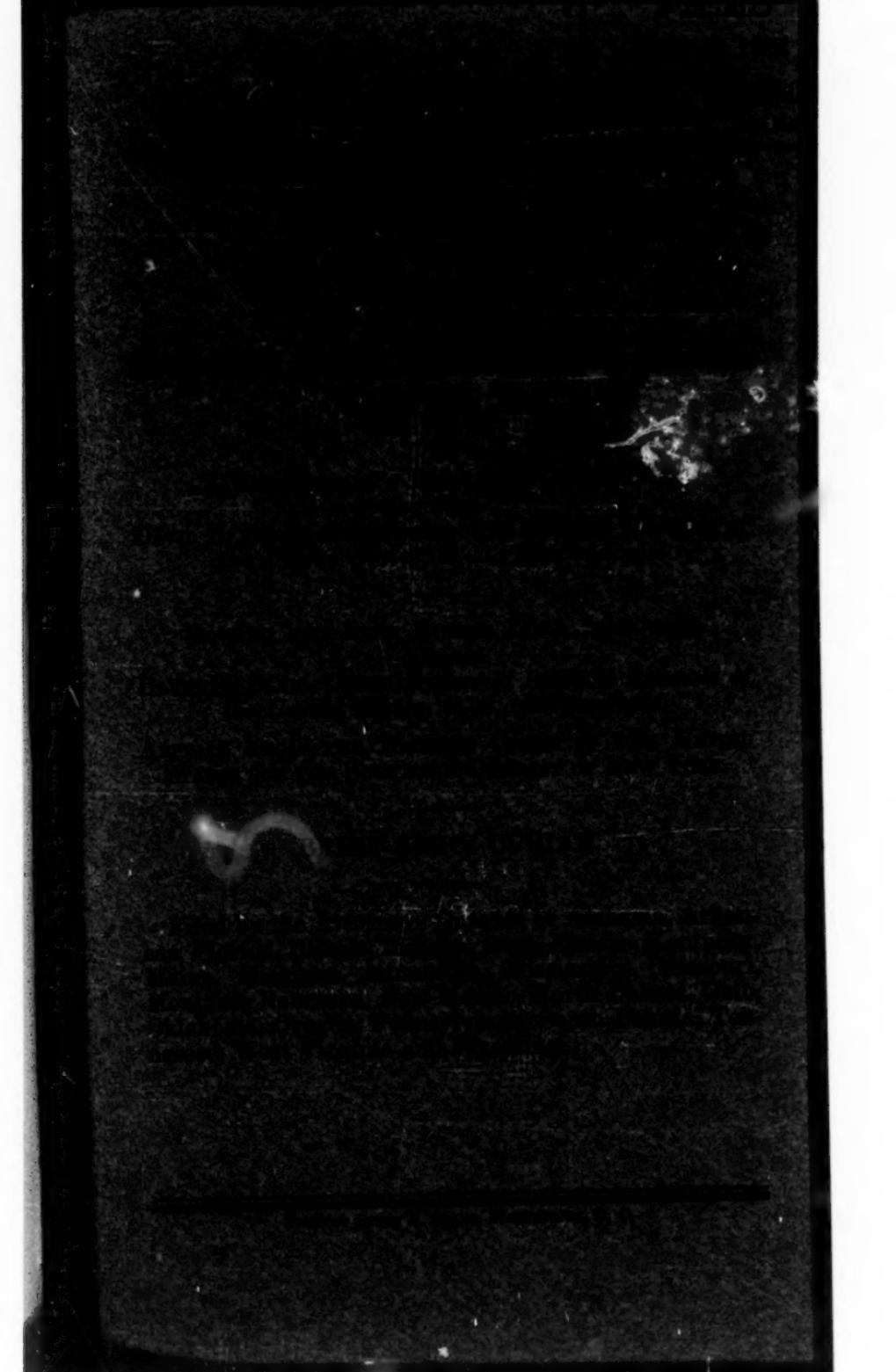
When the Eighteenth Amendment was ratified, the appellant was fairly justified in believing that Congress, in its enforcement legislation, would be limited to the prohibition of intoxicating liquors for beverage purposes, and that the right to sell its stout for medicinal purposes would lawfully continue under State legislation. This belief found confirmation in the National Prohibition Act, which was accepted by all as a declaration by Congress of a new and permanent public policy. This Act made express provision for the sale of medicinal liquors, and appellant was fairly justified in assuming and believing that this announced public policy would continue, or that, if discontinued, some reasonable time would be afforded it within which an adjustment could be made to new conditions without serious loss.

Under these circumstances, the passage of the Willis-Campbell Act, taking effect immediately, and making no provision for the disposition of stocks then lawfully on hand, was, as stated by the court in the case cited above, "tantamount to taking the property of complainant without due process of law."

Respectfully submitted,

SAMUEL W. MOORE,  
MARCUS L. BELL  
Solicitors for Appellant.

February, 1924.



## INDEX.

	PAGE
Statement—Questions of law involved.....	2
The Eighteenth Amendment is a valid part of the Constitution of the United States.....	4
The purpose and effect of the Eighteenth Amendment is to impose a general prohibition upon the traffic in intoxicating liquors for beverage purposes throughout the territorial limits of the United States.....	5
When a state legislature or Congress possesses power to prohibit a recognized evil like the beverage liquor traffic, it carries with it inherently the power to make its action effective, and may include within the scope of its prohibition acts innocuous in themselves.....	6
Twenty-nine states have prohibited beer for medicinal purposes under their police power, and the Eighteenth Amendment confers a similar legislative discretion upon Congress. The courts have uniformly sustained the legislation prohibiting beer as a medicine .....	13
The power of Congress to effectively prohibit the manufacture and sale of beverage liquors is as full and complete as the police power of the state to enforce such prohibition .....	29
The right to manufacture or sell intoxicating liquors is not an inherent right of citizenship.....	35
There is no right to practice medicine which is not subordinate to the police power.....	35
Congress prior to the Eighteenth Amendment prohibited the introduction of liquors into the Indian country. These acts contained no exceptions providing for medicinal use. The Alaska Prohibition Law permits alcohol only for medicinal use.....	38
The power to prohibit the manufacture or prescribing of liquor absolutely being established it necessarily includes the lesser power to regulate or permit conditionally .....	39
Legislative acts are presumed constitutional. In the exercise of its power to effect a Constitutional purpose Congress is the judge of the methods to be employed and the necessity which occasions their employment .....	44

	PAGE
The Fifth Amendment imposes no greater limitation upon Congress than the Fourteenth Amendment does upon the states .....	49
The evil sought to be prevented by the Eighteenth Amendment is the same as that sought to be prevented by the states in the exercise of their police power. If the subject of legislation be debatable the Legislature is entitled to its own judgment.....	50
The Eighteenth Amendment conferred no new right to manufacture or prescribe intoxicating liquors.....	53
Congress investigated the alleged therapeutic properties of beer. The overwhelming testimony of physicians, druggists and brewers showed that beer had no medicinal value .....	53
Conclusion .....	57

#### AUTHORITIES CITED.

Ah Sin v. Whitman, 198 U. S. 500.....	8
American Express Co. v. Beer, 65 So. 581.....	43
Armour Co. v. North Dakota, 240 U. S. 510.....	52
Barbour v. Georgia, 249 U. S. 454.....	35
Bartemeyer v. Iowa, 18 Wall. 129.....	35
Booth v. Illinois, 194 U. S. 425.....	8
Brushaber v. Union Pacific R. R. Co., 240 U. S. 1.....	46
Central Lumber Co. v. South Dakota, 226 U. S. 164....	52
Champion v. Ames, 188 U. S. 321.....	33, 46
Clark Distilling Co. v. Western Maryland R. Co., 242 U. S. 321 .....	41
Civil Rights Cases, 109 U. S. 3.....	32
Cooper v. State, 172 Pac. 276.....	26
Corneli v. Moore, 257 U. S. 491.....	33
Crane v. Campbell, 245 U. S. 304.....	8, 9, 25, 35
Cureton v. State, 135 Ga. 660, 70 S. E. 332, Appeal dismissed, 229 U. S. 630.....	14
Dakota T. Co. v. South Dakota Co., 250 U. S. 163.....	46
Dent v. West Virginia, 129 U. S. 114.....	35
Dillon v. Gloss, 256 U. S. 368.....	4
Erie R. R. Co. v. Williams, 233 U. S. 685.....	52
Ex parte Hixson, 214 Pac. 677.....	27
Ex parte Webb, 225 U. S. 663.....	38
Fong Yue Ting v. U. S., 149 U. S. 698.....	46

	PAGE
Gibbons v. Ogden, 9 Wheat 1.....	46
Giozza v. Tiernan, 148 U. S. 657.....	35
Gloucester Co. v. Pa., 114 U. S. 196.....	33
Gray v. State of Conn., 159 U. S. 74.....	36
Grogan v. Walker, 259 U. S. 80.....	5, 33
Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U. S. 146, 156 .....	45, 49
Hebe Co. v. Shaw, 248 U. S. 294.....	52
Hoke v. United States, 227 U. S. 309.....	9, 33
Hallowell v. United States, 221 U. S. 317.....	38
Interstate, etc., & Ry. Co. v. Mass., 207 U. S. 79.....	45
Joplin Mercantile Co. v. U. S., 236 U. S. 531.....	38
Keokee Consolidated Coke Co. v. Taylor, 234 U. S. 224..	52
Kidd v. Pearson, 128 U. S. 1.....	35
Knox v. Lee, 79 U. S. 457.....	48
Luther v. State (Neb.), 24 L. R. A. (N. S.), 1146.....	8
McCray v. United States, 195 U. S. 27.....	46, 49
McCulloch v. Maryland, 4 Wheat. 316.....	46, 48
Martin v. Hunter, 1 Wheat. 304.....	47
Motlow v. State, 125 Tenn. 547, 145 S. W. 177, Appeal dismissed, 239 U. S. 653.....	22
Mugler v. Kansas, 123 U. S. 123.....	35, 45
Ohio ex rel. Lloyd v. Dollison, 194 U. S. 445.....	43
O'Neil v. State, 115 Tenn. 427, 90 S. W. 27.....	37
Otis v. Parker, 187 U. S. 606.....	8
Pennel v. State, 141 Wise. 35.....	8
Perrin v. United States, 232 U. S. 478.....	38
Price v. Illinois, 238 U. S. 447.....	51
Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192....	6
Rast v. Van Deman, 240 U. S. 342.....	46, 53
Re Crane, 27 Idaho 671, 151 Pac. 1006.....	24
Reetz v. Michigan, 188 U. S. 503.....	37
Rhode Island v. Palmer, 253 U. S. 350.....	4, 29, 33
Rippey v. Texas, 193 U. S. 504.....	43
Ruppert v. Caffey, 251 U. S. 264.....	31, 32, 50
Seven Cases v. United States, 239 U. S. 510.....	9
Silz v. Hesterberg, 211 U. S. 31.....	8
Southern Express Co. v. State, 188 Ala. 454, 66 So. 122..	43
State v. Davis, 194 Mo. 485, 92 S. W. 484.....	37
State v. Doe, 92 Kan. 212, 139 Pac. 1170.....	43
State v. Durein, 70 Kan. 1, 78 Pac. 152, affirmed 208 U. S. 613 .....	17

PAGE	
State v. Edmunds, 127 Ia. 333, 101 N. W. 431.....	37
State ex rel. Guilbert v. Kauffman, 60 Ohio St. 635.....	8
State v. Jenkins, 64 N. H. 375.....	8
State v. Kane, 15 R. I. 395, 6 Atl. 783.....	23
State v. Kennedy, 16 R. I. 409, 17 Atl. 51.....	24
State v. Kurent, 105 Kan. 13, 181 Pac. 603.....	21
State v. Macek, 104 Kan. 742, 180 Pac. 985.....	20
State v. Miller, 92 Kan. 994, 142 Pac. 979.....	19
State v. O'Connell, 99 Me. 61.....	8
State v. Rosenkrans, 30 R. I. 374, 75 Atl. 491.....	37
State v. U. S. Express Co., 164 Ia. 112, 145 N. W. 451.....	43
State v. Weiss, 85 Kan. 165, 113 Pac. 388.....	18
State v. York, 74 N. H. 125.....	8
Stewart v. Kahn, 78 U. S. 493.....	48
U. S. v. Behrman, 258 U. S. 280.....	12
U. S. v. Cohn, 52 S. W. Rep. 38, 2 Ind. Terr., 474.....	38
U. S. v. Cruikshank, 1 Woods 308.....	32
United States v. Des Moines Co., 142 U. S. 510.....	46
U. S. v. Doremus, 249 U. S. 86.....	10, 33
U. S. v. Ferger, 250 U. S. 199.....	9, 33
U. S. v. Fisher, 2 Cranch. 358.....	46
U. S. v. Rhodes, 1 Abb. U. S. 28.....	32
U. S. v. United Shoe Machinery Co., 234 Fed. 127.....	44
U. S. v. 43 Gallons of Whiskey, 93 U. S. 188.....	38
U. S. Express Co. v. Friedman, 191 Fed. 673.....	38
Veazie Bank v. Fenno, 75 U. S. 533.....	48
Watson v. Maryland, 218 U. S. 172.....	37
Webb v. U. S. 249 U. S. 96.....	11
Weber v. Freed, 239 U. S. 325.....	46
Williams v. Arkansas, 217 U. S. 77.....	37

**MISCELLANEOUS.**

Hearings before House Judiciary Committee, 67th Congress .....	53
--	----

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1923

---

No. 200

JAMES EVERARD'S BREWERIES, *Appellants,*  
*against*

DAVID H. BLAIR, *Commissioner of Internal Revenue of*  
*the United States, et al., Respondents.*

No. 245

EDWARD AND JOHN BURKE, LTD., *Appellants,*  
*against*

DAVID H. BLAIR, *Commissioner of Internal Revenue of*  
*the United States, et al., Respondents.*

---

APPEALS FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF AMICI CURIAE***On Behalf of Respondents*

In view of the provisions of law in State codes relating to the manufacture and prescribing of medicinal liquor, similar to the provisions of the National Prohibition Act the outcome of this case is of vital interest to the States. With the permission of the Court this brief is filed in the hope that some of the authorities and reasons given may prove helpful in the consideration of the questions of law involved.

**PROPOSITIONS OF LAW SUSTAINED BY THIS  
BRIEF**

This brief is submitted in support of the proposition that the provisions of the Act of Congress of November 23, 1921, known as the Supplemental Prohibition Act prohibiting the manufacture or prescribing of beer for medicinal purposes and the provisions of said act and of the National Prohibition Act regulating the prescribing of whiskey and wine and limiting the quantity which may be prescribed within a period of ten days, are appropriate legislation for the enforcement of the Eighteenth Amendment and are constitutional.

**CONSTITUTIONAL AND STATUTORY PRO-  
VISIONS INVOLVED**

The Eighteenth Amendment to the Constitution of the United States provides that "the manufacture, sale or transportation of *intoxicating liquors* within, or importation thereof into, or the exportation thereof from the United States, and all territory subject to the

jurisdiction thereof for *beverage purposes* is hereby prohibited."

Section 2 of said Amendment is as follows: "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

Pursuant to the Eighteenth Amendment Congress has enacted the National Prohibition Act (41 Stat. 305), in Section 1 of Title II of which Act the word "liquor" or the phrase "intoxicating liquor" is defined to include "alcohol, brandy, whiskey, rum, gin, beer, ale, porter and wine, and in addition thereto any spirituous, vinous, malt or fermented liquors, liquids, compounds \* \* \* and by whatever name called containing one-half of one per centum or more of alcohol by volume which are fit for use for beverage purposes." This Act (Section 3) also makes it unlawful for any person to manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor, except as is provided in said Act. Section 6 requires a permit to manufacture or prescribe liquor for medicinal purposes. Said Act (Section 37) also requires all manufacturers of certain beverages containing less than one-half of one per centum of alcohol by volume, which are manufactured by the usual methods of fermentation and fortification and dealcoholized before being removed from the factory or marketed, to secure a permit therefor before engaging in said manufacturing.

The Sixty-Seventh Congress enacted an Amendment to the National Prohibition Act being "An Act Supplemental to the National Prohibition Act (Public No. 96, 67th Congress) Approved November 23, 1921." This Act provides that the word "liquor" and the phrase "intoxicating liquor" when used in this Act

shall have the same meaning as they have in Title II, of the National Prohibition Act. Section 2 of this Act provides that "only spirituous and vinous liquors may be prescribed for medicinal purposes and all permits to prescribe and prescriptions for any other liquor shall be void." This Act further limits the amount of spirituous or vinous liquors that may be prescribed upon any one prescription within a period of ten days as well as the number of prescriptions which any physician may issue within a certain stated period.

It is contended that this Amendment (Public No. 96, 67th Congress) is violative of the Eighteenth Amendment for the alleged reason that the Eighteenth Amendment has limited Congress to the prohibition of intoxicating liquors that are used for beverage purposes, and that Congress has no authority to legislate concerning liquors used for non-beverage purposes, and it is also contended that this Act is violative of the Due Process Clause of the Fifth Amendment to the United States Constitution.

#### ARGUMENT

#### THE EIGHTEENTH AMENDMENT IS A VALID PART OF THE CONSTITUTION OF THE UNITED STATES.

In the case of Rhode Island v. Palmer, 253 U. S. 350, the court said:

"That Amendment, \* \* \* has become a part of the Constitution and must be respected and given effect, the same as other provisions of that instrument."

See also Dillon v. Gloss, 256 U. S. 368.

THE PURPOSE AND EFFECT OF THE EIGHTEENTH AMENDMENT IS TO IMPOSE A GENERAL PROHIBITION UPON THE TRAFFIC IN INTOXICATING LIQUORS FOR BEVERAGE PURPOSES THROUGHOUT THE TERRITORIAL LIMITS OF THE UNITED STATES.

The Eighteenth Amendment prohibits the manufacture, sale or transportation of intoxicating liquors for beverage purposes. This Amendment, however, does not define what are intoxicating liquors, but having forbidden the traffic in intoxicating liquors for beverage purposes, it confers upon Congress and the several States the power and authority to define what are intoxicating liquors within the constitutional prohibition; and to pass all needful legislation to give effect to the constitutional prohibition against the traffic in intoxicating liquors when so defined.

The unquestioned purpose of this Amendment is to absolutely prohibit all traffic in and use of intoxicating liquor for beverage purposes, and to protect the people against the well known evils of such traffic; and in order to completely effectuate that purpose Congress has been clothed with full power to legislate with respect to the subject matter as will completely and effectively accomplish that purpose. In the case of *Grogan v. Walker*, 259 U. S. 80, the court said:

\*\*\* \* \* \* It is obvious that those whose wishes and opinions were embodied in the Amendment meant to stop the whole business. \* \* \*

WHEN A STATE LEGISLATURE OR CONGRESS POSSESS POWER TO PROHIBIT A RECOGNIZED EVIL LIKE THE LIQUOR TRAFFIC IT CARRIES WITH IT INHERENTLY THE POWER TO MAKE ITS ACTION EFFECTIVE AND MAY INCLUDE WITHIN THE SCOPE OF ITS PROHIBITION ACTS INNOCUOUS IN THEMSELVES.

In *Purity Extract Company v. Lynch*, 226 U. S. 192, the question of the constitutionality of Chapter 113 of the Statutes of Mississippi, 1908, was involved. This statute prohibited the sale of malt liquor called "Poinsetta." It appeared that this malt liquor contained no alcohol and was non-intoxicating and could not be mistaken for beer. The manufacturer contended this Act was unconstitutional. In upholding the constitutionality of this Act the court through Mr. Justice Hughes said:

"Poinsetta may or may not be an intoxicant, but it is a malt liquor, and as such is prohibited from being sold in this State.

"It is well established that when a State exercising its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in the prohibition, the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government.

"With the wisdom of the exercise of that judgment, the court has no concern; and unless it

clearly appears that the enactment has no essential relation to a proper purpose, it cannot be said that the limit of the legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature, a notion foreign to our constitutional system.

"It was competent for the legislature of Mississippi to recognize the difficulties besetting the administration of laws aimed at the prevention of traffic in intoxicants. It prohibited among other things, the sale of malt liquor. In thus dealing with a class of beverages which, in general, are regarded as intoxicants, it was not bound to resort to a discrimination with respect to ingredients and processes of manufacture, which in the endeavor to eliminate innocuous beverages from the combination would facilitate subterfuges and frauds and fetter the enforcement of the law. A contrary conclusion logically presented would save the nominal power while preventing its effective exercise. The Statute established its own category.

"The State within the limits we have stated must decide upon the measures that are needful for the protection of its people, and having regard to the artifices which are used to permit the sale of intoxicants under the guise of innocent beverages, it would constitute an unwarrantable departure from an accepted principle to hold that the prohibition of the sale of all malt liquors, including the beverage in question, was beyond its reserved powers."

That the general prohibition of the sale of malt liquors whether intoxicating or not is a necessary means of suppressing the traffic in intoxicating liquors is very consistently held by the State Courts. On this point see:

State v. O'Connell, 99 Me. 61; State v. Jenkins, 65 N. H. 375; State v. York, 74 N. H. 125; State ex rel. Guilbert v. Kauffman, 68 Ohio St. 635; Luther v. State (Neb.) 24 L. R. A., (N. S.) 1146; Pennel v. State, 141 Wisc. 35.

In the case of Booth v. Illinois, 184 U. S. 425, the question before the court was whether the Legislature of Illinois had the power to declare options to sell and buy grain illegal, although no element of gambling was involved. The court in upholding the constitutionality of this Act said:

"A calling may not in itself be immoral and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If looking at all the circumstances that attend or which ordinarily may attend the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the court cannot interfere, unless, looking through mere form and at the substance of the matter they can say that the Statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of the right secured by the fundamental law. \* \* \* It must be assumed that the Legislature was of opinion that an effectual method to suppress gambling grain contracts was to declare illegal all options to sell or buy at a future time. The court is unable to say that the means applied were not appropriate to the end sought to be obtained and which it was competent for the State to accomplish."

See Silz v. Hesterberg, 211 U. S. 31; Otis v. Parker, 187 U. S. 606; Ah Sin v. Whitman, 198 U. S. 500; Crane

v. Campbell, 245 U. S. 304. Seven Cases v. United States, 239 U. S. 510.

In Crane v. Campbell, 245 U. S. 304, arising under a State law prohibiting the possession of whiskey, even though for medicinal purposes, the court said:

“As the State has the power indicated to prohibit, it may adopt measures as are reasonably appropriate or needful to render exercise of that power effective.”

Similarly when Congress is given power by the Constitution over a subject matter it possesses full power to make the purpose effective. In the case of Hoke v. United States, 227 U. S. 309, the court held where Congress had power to control a subject-matter it could adopt any “convenient” means to accomplish the end. The language of the court is as follows:

“Congress may adopt not only means necessary but convenient to its exercise, and the means may have the quality of a police regulation.”

In the case of United States v. Ferger, 250 U. S. 199, 63 L. Ed. 936, where the Act of Congress prohibiting and punishing the using of false bills of lading in interstate commerce was before the court, in speaking of the power to control incidents reasonably related to the authority conferred the court said:

“We think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstructions to interstate commerce and with a host

of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate *although they are not interstate commerce in and of themselves.*"

In the case of United States v. Doremus, 249 U. S. 86, the Harrison Narcotic Drug Act, making it unlawful to sell certain drugs unless registered, enacted by Congress under Article I of Section 8 of the United States Constitution giving to Congress the right to lay and collect taxes, duties, imposts, and excises, etc., was held by the court to be constitutional. In this case the court said:

"The Congress may select the subjects of taxation, and may exercise the power conferred at its discretion \* \* \* and from an early day this court has held that the fact that other motives may impel the exercise of Federal taxing power does not authorize the court to inquire into that subject. If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it.

"The provisions of Section 2 aimed to confine sales to registered dealers and to those dispensing the drugs as physicians, and to those who come to dealers with legitimate prescriptions by physicians. Congress with full power over the subject, short of arbitrary and unreasonable action, which is not to be assumed, inserted these provisions in an act specifically providing for the raising of revenue. Considered of themselves, we think they tend to keep the traffic above board and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity

of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the Federal law." —

In this case Congress deemed it wise to prevent the sales of drugs except by registered dealers and to require patients to obtain those drugs as a medicine from physicians and upon regular prescriptions so as to prevent persons from selling drugs without paying the tax.

The Narcotic Drug Act as interpreted by the United States Supreme Court is clearly illustrative of the extent to which Congress may regulate physicians as an incident to a power conferred by the Constitution. This act is passed in the exercise of the taxing power. It would seem that since it is a revenue measure the interests of the Federal Government would be completely served when all of the conditions had been met and the tax collected. Such has not been the interpretation placed upon it by the Supreme Court. In *Webb v. United States*, 249 U. S. 96, 63 L. Ed. 497, certain facts and questions were certified to the Court by the Circuit Court of Appeals, 6th Circuit. The facts were:

"Webb was a practicing physician and Goldbaum a retail druggist, in Memphis. It was Webb's regular custom and practice to prescribe morphine for habitual users upon their application to him therefor. He furnished these 'prescriptions' not after consideration of the applicant's individual case, and in such quantities and with such direction as, in his judgment, would tend to cure the habit, or as might be necessary or helpful in an attempt to break the habit, but with such consideration and rather in such quantities as the applicant desired for the sake of con-

tinuing his accustomed use. Goldbaum was familiar with such practice and habitually filled such prescriptions. Webb had duly registered and paid the special tax as required by Section 1 of the act. Goldbaum had also registered and paid such tax and kept all records required by the law."

One of the questions asked was:

"If the practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, is such order a physician's prescription under exception (b) of Section 2?"

The court said:

"As to question three—to call such an order for the use of morphine a physician's prescription would be so plain a perversion of meaning that no discussion of the subject is required. That question should be answered in the negative."

In this case the defendants had registered, paid the tax and kept all the required records which would have insured the collection of the revenue due the government, nevertheless the act as construed imposes a limitation upon the issuance of prescriptions by physicians in the nature of a police regulation which was held not in excess of the power conferred by the Constitution to levy taxes. This view was later affirmed by the Supreme Court in the case of United States v. Behrman, 258 U. S. 280; 66 L. Ed. 619, wherein it was held:

"The exception from the prohibition of the Harrison Anti-Narcotic Act of December 17, 1914, section 2, against sales of narcotic drugs to persons not having a written order in official form, which that section makes in favor of registered physicians dispensing or distributing such drugs to patients in the course of their professional practice only, does not protect a physician who has issued to one known by him to be a drug addict three so-called prescriptions calling respectively for 150 grains of heroin, 360 grains of morphine, and 210 grains of cocaine."

If Congress in the exercise of the taxing power may penalize a physician who issues "so-called" prescriptions for narcotics in such excessive quantities as to indicate that they are not for bona fide medicinal use there is certainly less reason to hold that Congress may not establish reasonable regulations relating to the prescribing of intoxicating liquor under the power conferred by the Eighteenth Amendment to prohibit the beverage use and to provide a penalty for the violation thereof.

#### VIII. TWENTY-NINE STATES HAVE PROHIBITED BEER FOR MEDICINAL PURPOSES UNDER THEIR POLICE POWER, AND THE EIGHTEENTH AMENDMENT CONFERS A SIMILAR LEGISLATIVE DISCRETION UPON CONGRESS. THE COURTS HAVE UNIFORMLY SUSTAINED LEGISLATION PROHIBITING BEER AS A MEDICINE.

The power of a State in the enforcement of its prohibitory liquor laws to prohibit, as an incident necessary to their enforcement, the manufacture and sale of liquors for medicinal purposes has been sustained

by the highest courts of the States and recognized by the Supreme Court of the United States.

In the case of Cureton v. State, 135 Ga. 660, 70 S. E. 332-49 L. R. A. (N. S.) 182, the question of the validity of the Prohibition Act of Georgia, (Acts of 1907, p. 81) was involved. One of the specific questions which was certified by the Court of Appeals to the Supreme Court was: "Is the Act approved August 6, 1907 (Acts of 1907, p. 81), commonly known as the Prohibition Law, unconstitutional and invalid in that it absolutely and totally prohibits the manufacture of alcohol for any and every purpose including its use for medicinal, scientific and mechanical purposes, and its use in the arts as well as other uses than as a beverage?"

The argument which was made and the view taken by the Supreme Court, which was concurred in by all of the justices, is best set forth in the language of the opinion of the court delivered by Judge Lumpkin:

"It was argued that because, under the act of 1907 the sale of alcohol for certain specified purposes and under certain restrictions was not unlawful, therefore to prohibit the manufacture of that which may have a lawful use or sale was violation of the section of the State Constitution which provides that no person shall be deprived of life, liberty, or property, except by due process of law, and likewise of the 14th Amendment to the Constitution of the United States; in other words, that because there may be some lawful use of a thing, the legislature cannot prohibit its manufacture. A somewhat similar argument was advanced in the Mugler Case, *supra*, where it was contended that 'no convention or legislature has the right, under our form of government to prohibit any citizen

from manufacturing for his own use, or for export, or storage, any article of food or drink not endangering or affecting the rights of others.' But Mr. Justice Harlan said (123 U. S. 662): \* \* \* 'And so, if, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of the question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the Constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship.' "

In Kidd v. Pearson, 128 U. S. 1, 32 L. Ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, a statute of Iowa was under consideration. The Supreme Court of that State construed the statute to mean: (1) That foreign intoxicating liquors might be imported into the State, and there kept for sale by the importer in the original package (or for transportation in such packages and sale beyond the limits of the State); (2) that intoxicating liquors might be manufactured and sold within the State for mechanical, medicinal, culinary, and sacramental purposes, but for no other—not even for the purpose of transportation beyond the limits of the State. It held that the statute, thus construed, raised no conflict with the Constitution of the United States and was therefore valid. Accepting this construction, the Supreme Court of the United States declared that "THE RIGHT OF A STATE TO ENACT A STATUTE PROHIBITING THE MANUFACTURE OF IN-

TOXICATING LIQUORS WITHIN ITS LIMITS IS NOT AFFECTED BY THE FACT THAT THE MANUFACTURER OF SUCH SPIRITS INTENDS TO EXPORT THEM WHEN MANUFACTURED." Here was a way in which the liquors could have been used without violating the law prohibiting the sale within the State. But the possibility of such a use did not destroy the right of the State to prohibit the manufacture. Insofar as the decision in that case dealt with the difference between manufacture and commerce, and with the interstate commerce clause of the Constitution of the United States, it is not applicable to the case now before us; but in so far as it dealt with the police power of the State over the manufacture of intoxicating liquors it is in point. Mr. Justice Lamar said (128 U. S. 23): "We have seen that whether a State, in the exercise of its undisputed power of local administration, can enact a statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, is not any longer an open question before the court." The State, in the exercise of its police power, has the right to prohibit or restrict the manufacture of intoxicating liquors within its limits. In the case last cited such manufacture was permitted only for particular purposes; BUT WHETHER IT SHOULD BE PERMITTED FOR THOSE PURPOSES OR NOT WAS A MATTER OF LEGISLATIVE DISCRETION.

"In this State the legislature has seen fit to prohibit altogether the manufacture or sale of alcoholic, spirituous, malt, or intoxicating liquors. Alcohol may be sold for certain purposes and under certain restrictions only. It was doubtless felt that to permit distilleries to be operated over the State, under a claim that the proprietors desired to make alcohol for lawful uses, rather than whiskey or alcohol for other uses, would render the

prohibition law of little effect, and that the total prohibition of such manufacture was a necessary and proper means to render efficient the general prohibition law, and to guard against the evils of intemperance. The courts cannot declare that the legislature was without this power, or that it was such an arbitrary exercise of power as to violate the provisions of the Constitution referred to in the questions propounded by the court of appeals."

In this case it was also contended that the State statute was in violation of the Fourteenth Amendment to the Constitution of the United States. This objection was overruled by the State supreme court. An appeal was taken to the Supreme Court of the United States, which was dismissed May 12, 1913, 229 U. S. 630, 57 L. Ed. 1358, 33 Su. Ct. Reporter 778, thereby indicating that the Supreme Court of the United States considered no rights guaranteed by the Constitution of the United States were infringed by this statute.

*Even where a Constitutional Amendment prohibits the sale of intoxicating liquors except for medical, scientific, and mechanical purposes the courts hold that the exceptions made cannot be construed to prevent the adequate enforcement of the prohibition against the use of such liquors for beverage purposes.* This precise question was raised in the case of *State v. Durein*, 70 Kansas, 1, 78, Pac. 152, 15 L. R. A. (N. S.) 908, 905.

In a unanimous opinion of the court delivered by Judge Burch the authorities are reviewed and the following language is used:

The amendment to the Constitution of this State already quoted does not limit or abridge the power of the legislature further to prohibit the traffic in

intoxicating liquor. It restrains the legislature in its power to tolerate only, and not in its power to suppress. The sole purpose of the exception relating to medical, scientific, and mechanical purposes is to mark the limit of the positive inhibition which is established. There is no convenient word which connotes all the purposes other than medical, scientific, and mechanical for which intoxicating liquors may be used. If such other purposes may be indicated by the word "beverage" the effect of the amendment is the same as if it simply read "The manufacture and sale of intoxicating liquors for beverage purposes shall be forever prohibited in this State." Therefore the status of the manufacture and sale of such liquors for medical, scientific, and mechanical purposes was in no manner fortified by the constitutional amendment, but it was left to be dealt with by the legislature as necessity might require, having particular regard to the complete suppression of manufacture and sale for beverage purposes."

This decision was later affirmed by the Supreme Court of the United States, January 13, 1908, 208 U. S. 613, 52 L. Ed., 645, 28 Su. Ct. Rep. 567.

In the later case of *State v. Weiss*, 84 Kans. 165, 113 Pac. 388, 36 L. R. A. (N. S.) 73, the court held:

"The constitutional amendment forever prohibiting the manufacture and sale of intoxicating liquors in this State, except for medical, scientific, and mechanical purposes, is not a restriction upon the power of the legislature to prohibit by statute. In the absence of such amendment, the legislature would possess such power, and its authority is not diminished thereby. Sections 1 and 2 of chapter 164 of the Laws of 1909 (Gen. Stat. 1909, Secs. 4361, 4362) making it unlawful to sell intoxicating liquors for any purposes, upheld."

Section 1 of the original prohibition law of Kansas read:

"Any person or persons who shall manufacture, sell or barter any spirituous, malt, vinous, fermented or other intoxicating liquors, shall be guilty of a misdemeanor, and punished as herein-after provided: Provided, however, that such liquors may be sold for medical, scientific and mechanical purposes, as provided in this act."

In 1909 the legislature amended this section of the statute by striking out the provision that liquors might be sold for the three excepted purposes. Judge Burch in the case of State v. Miller, 92 Kan. 994, 142 p. 979 speaking for the Supreme Court said:

"In 1909 the Legislature passed a new act which extended the prohibition of the law to the manufacture and sale of intoxicating liquors for medical, scientific, and mechanical purposes, and which superceded the old definition of intoxicating liquors."

\* \* \* \* \*

"Fear lest the law might be brought into disrepute by encroachment on the right to use preparations containing alcohol was no longer entertained. Nearly 30 years' experience disclosed that restraints, which year by year had been continually imposed, and which would have been regarded as unnecessary and unreasonable when the law was new and strange, were fit and wholesome, and were approved by public sentiment. The progress of events had been such, when the Legislature approached a revision of the law in 1909, that the intellectual, moral, social and legal atmos-

phere had become a wholly different medium from that in which the Legislature of 1881 labored.

“The legislature was not doing an idle thing by repealing one definition and substituting another. It intended to change the law, and the result is that the classification established by the intoxicating liquor cases is abrogated.”

In 1917 the Legislature of Kansas enacted the Bone Dry Law which prohibits the sale of anything save alcohol for medicinal purposes. Such sales are limited to druggists, hospitals and institutions authorized to receive. No provision is made for dispensing upon prescription. The validity of this act was before the Supreme Court of Kansas in the case of State v. Macek 104 Kan. 742, 180 P. 985, wherein Judge Dawson speaking for the court said:

“We come, then, to the last and only serious question in this lawsuit—the constitutionality of the bone dry law. Appellant says that it is unconstitutional and void, and cites many a respectable authority and precedent from Blackstone’s time down to yesterday to that effect. But they all stop yesterday! The times change. Men change, and their opinions change; their notions of right and wrong change. The United States, its government and people, have come a long, long way since the Washingtonian Society was organized in 1840 to combat intemperance. A whole generation of Americans has been born and educated, and has grown to maturity and taken its dominant place in the electorate and in official life, since instruction in the evil effects of intoxicants upon the human system became compulsory in our public schools. Laws 1885, c. 169; Gen. Stat. 1915, Sec. 9034. That is the leaven which has leavened the whole

lump. ‘Learn young, learn fair,’ is an old adage whose efficacy was never better proved than in the practical annihilation of the liquor traffic by the unnoticed but persistent work of the public schools for the last 30 years. While we of an earlier generation continued to argue the pros and cons of the liquor traffic, and the wisdom, or folly, or impossibility, of suppressing the sale and use of intoxicants a generation arrived which will have none of it; that generation has said so as clearly and emphatically as the American people ever voiced their determination on any subject since 1776. Eighteenth Amendment U. S. Const. And because of the ease with which the law prohibiting sales, etc., of liquor may be violated and the difficulty of procuring evidence of such violation, the Legislature in 1917 (chapter 215) decreed that the mere possession of intoxicants, or knowingly to permit them to be kept on one’s premises should be unlawful. Any Legislature sincerely determined to suppress the sale of liquor and to suppress the keeping of tippling nuisances would be strongly persuaded to go the final step of forbidding the mere possession of intoxicants; otherwise its laws forbidding liquor sales and the existence of drinking dens would be bound to be somewhat ineffective. The whole matter is one of public policy. And the public policy of a State must largely be shaped by legislation. No Federal or State constitutional inhibition was violated in the enactment of the bone dry law, all of yesterday’s juristic dissertations and precedents to the contrary notwithstanding.”

This decision was also followed by the subsequent case of *State v. Kurent*, 105 Kan. 13, 181 P. 603, where the constitutionality of the statute was reaffirmed. It must be borne in mind that this is the status of law in a State where the State constitutional provision reads:

"The manufacture and sale of intoxicating liquor shall be forever prohibited in this State, except for medicinal, scientific and mechanical purposes."

The legislature of Tennessee by Acts of 1909, Chap. 10, prohibited the sale of intoxicating liquor as a beverage and prohibited the manufacture of all alcoholic liquor except alcohol of 188 test. The effect of this statute was to prohibit the manufacture of all liquors except alcohol of 188% proof. No whiskey, beer, wine, or other intoxicants could be manufactured in the State no matter whether intended for medicinal, mechanical, scientific, sacramental or other purposes. The contention was made in the case of Motlow v. State, 125 Tenn. 547, 145 S. W. 177, L. R. A. 1916 F p. 177, that this was an unjust and unreasonable discrimination against the manufacture of liquors designated for non-beverage use.

The Court held:

"No unconstitutional discrimination is made against local manufacturers in favor of those of other States, by forbidding the manufacture of intoxicating liquors within the State while permitting their sale for certain purposes, although the result is to require those sold to be secured outside the State.

"The legislature may constitutionally forbid the manufacture of intoxicating liquors within the State while permitting their sale for medicinal and other non-beverage purposes.

"There is no property right in the manufacture of intoxicating liquors which cannot be taken away under the police power of the State, although such liquors are capable of harmless use."

This case, upon appeal, was dismissed by the Supreme Court of the United States, October 8, 1915, 239 U. S. 653, 60 L. Ed. 487, 36 Sup. Ct. Rep. 161.

In 1886 Rhode Island adopted an amendment to the constitution of the State which in its wording was very similar to the language of the Eighteenth Amendment to the Constitution of the United States. In the case of State v. Kane, 15 R. I. 395, 6 Atl. 783, the question of the relation of the amendment to non-beverage liquor was before the Supreme Court of that State. It was held:

"The manufacture and sale of intoxicating liquors, to be used as a beverage, shall be prohibited. The general assembly shall provide by law for carrying this article into effect. Held, this does not limit the power the general assembly previously had to pass a prohibitory law. Held, also, this does not impliedly license the manufacture and sale of intoxicating liquors for other purposes than as a beverage."

In construing the second clause of the amendment, which conferred power upon the legislature to make the prohibition effective the Supreme Court said in that case at page 785:

"OF COURSE, IF THE GENERAL ASSEMBLY HAD PREVIOUSLY HAD NO POWER TO LEGISLATE, THIS COMMAND WOULD CONFER BY IMPLICATION THE POWER REQUIRED FOR ITS OWN EXECUTION."

While in the case the court recognized that under the police power the State would have had the power to prohibit the sale of liquors for beverage purposes in the absence of a constitutional provision it was careful to point out that even in the absence of such pre-existing authority where the right was conferred by a constitutional provision there was *conferred by necessity*.

*sary implication the power required for its execution.*

The Supreme Court of Rhode Island reaffirmed this view in the case of State v. Kennedy, 16 R. I. 409, 17 Atl. 51, wherein it was said:

"In State v. Kane, 15 R. I. 395, 6 Atl. Rep. 783, we carefully considered the point here raised, and expressed the opinion that while the fifth amendment to the constitution, commonly called the 'Prohibitory Amendment,' makes it obligatory on the general assembly to enact laws to prevent the sale of intoxicating liquors 'to be used as a beverage,' it does not take away from the general assembly either expressly or by implication, the power which it previously had to restrict the sale, for other purposes, to certain persons or classes of persons; BUT RATHER ON THE CONTRARY, MAKES IT THEIR DUTY TO IMPOSE SUCH A RESTRICTION, IF, BY SO DOING, THEY CAN THE MORE EFFECTUALLY PREVENT THE SELLING AND KEEPING FOR SALE FOR USE AS A BEVERAGE. WE REMAIN OF THE OPINION THERE EXPRESSED. EXCEPTIONS OVERRULED."

In the case of Re. Crane, 27 Idaho 671, 151 P. 1006, L. R. A. 1918 A. 942, the Supreme Court of Idaho in construing the law of that State, Session Laws 1915, Chapter 11, said:

"The only means provided by the act for procuring intoxicating liquors in a prohibition district for any purpose relates to wine to be used for sacramental purposes and PURE ALCOHOL TO BE USED FOR SCIENTIFIC OR MECHANICAL PURPOSES, OR FOR COMPOUNDING OR PREPARING MEDICINES, SO THAT THE POSSESSION OF WHISKEY, OR OF ANY INTOXICATING LIQUOR, OTHER THAN WINE

AND PURE ALCOHOL FOR THE USES  
ABOVE MENTIONED, IS PROHIBITED."

"No fixed rule has been discovered by which to determine whether or not a statute of the nature of the one under consideration is a proper exercise of the police power, but it may be said the questions propounded to the courts are: Does the statute purport to have been enacted to protect the public health, the public morals, or the public safety? Has it a real and substantial relation to those objects, or is it, upon the other hand, a palpable invasion of right secured by the Constitution? Questions as to the wisdom and expediency of such legislation address themselves to the legislative, not to the judicial branch of the government.

"We have reached the conclusion that this act is not in contravention of section 1 of the 14th Amendment to the Constitution of the United States, nor of section 13, article 1, of the Constitution of Idaho; that it was passed by the legislature with a view to the protection of the public health, the public morals, and the public safety; that it has a real and substantial relation to those objects; and that it is, therefore, a reasonable exercise of the police power of the State."

The Supreme Court of the United States, Dec. 10, 1917, sustained the validity of the statute, *Crane v. Campbell*, 245 U. S. 304, 62 L. Ed. 304, 38 Su. Ct. 98, and after repeating the language of the lower court which pointed out that the only exceptions made to the prohibitions of the statute was in the case of WINE to be used for sacramental purposes and pure ALCOHOL to be used for scientific or mechanical purposes or for compounding or preparing medicine, said:

"It must now be regarded as settled that, on account of their well-known noxious qualities and

extraordinary evils shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guaranties of the 14th Amendment; *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. Ed. 929; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 33, 24 L. Ed. 989, 992; *Mugler v. Kansas*, 123 U. S. 623, 662, 31 L. Ed. 205, 210, 8 Sup. Ct. Rep. 273; *Crowley v. Christensen*, 137 U. S. 86, 91, 34 L. Ed. 620, 11 Sup. Ct. Rep. 13; *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 201, 57 L. Ed. 184, 187, 33 Sup. Ct. Rep. 44; *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U. S. 311, 320, 321, 61 L. Ed. 326, 335, 336, L. R. A., 1917B, 1218, 37 Sup. Ct. Rep. 180, Ann. Cas. 1917B, 845; *Seaboard Air Line R. Co. v. North Carolina*, 245 U. S. 298, ante, 299, 38 Sup. Ct. Rep. 96.

\* \* \* \* \*

"As the State has the power above indicated to prohibit it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective. \* \* \* And considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors we are unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose."

The *CONSTITUTION* of one State, that of *ARIZONA*, as construed by the Supreme Court of that State prohibits the prescribing of either alcohol or any form of intoxicating liquors. Article XXIII of the Constitution of Arizona was construed by the Supreme Court of that State in the case of *Cooper v. State*, 172 Pac. 276. The court said:

"The Constitution forbids the sale and disposition of ardent spirits, ale, beer, and wine and of intoxicating liquors of any kind to any person in the State of Arizona. Article 23, Constitution. IT CONTAINS NO EXCEPTIONS, AS THAT IT MAY BE PRESCRIBED AND SOLD AS A MEDICINE OR FOR MEDICINAL PURPOSES. Neither doctors nor druggists, nor any one else may sell or dispose of any of the named or described liquors as such, or when compounded as a medicine. It is not a regulatory provision, but one of outlawry. It is one of suppression and not one of supervision. The fact that ardent spirits are mixed with other ingredients, and, as thus compounded, labeled, Jamaica Ginger and sometimes used for medicinal purposes, does not change the situation."

The entire question of the right to prohibit or regulate the prescribing of liquors for medicinal purposes, including the validity of the provisions of the National Prohibition Act, has just been the subject of a careful review by the District Court of Appeals for the Second District of California in the case of *Ex parte Hixson*, 214 Pac. 677, decided February 28, 1923.

In conclusion, in sustaining the validity of the limitation of the city ordinance and the National Prohibition Act, the court said:

"\* \* \* We think that the ordinance would not have been unreasonable and void if it had entirely prohibited the sale of alcoholic liquor as a medicine. And if the city possessed the power entirely to prohibit its sale as a medicine, then a fortiori, the limitation to eight ounces in ten days, would not have been an unreasonable restriction.  
\* \* \* Concluding as we do, that the city of Los Angeles, had it chosen to exercise the power might

have prohibited in the first instance all sales of alcoholic liquor as a medicine, it cannot be held that the city's restriction upon the filling of prescriptions by pharmacists has been so far augmented by the National Prohibition Law that it has now become unreasonable and void."

There is no inherent right to manufacture, sell or prescribe malt liquors for medicinal purposes. This is shown by the exhibit appended containing a summary of the laws of the several states relating to the prescription of liquors. (P. 59.) In twenty-nine out of the forty-eight States of the Union, namely, Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Maine, Iowa, Kansas, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Tennessee, Utah, Washington, and West Virginia, no form of malt liquor may be prescribed. While in four of the remaining States, namely, Colorado, Michigan, Minnesota and Virginia the quantity of intoxicating liquor which may be prescribed under the provisions of State law is so small as to indicate that it was not contemplated by the legislative body that malt liquors should be sold or prescribed for medicinal purposes.

In California, Connecticut, Kentucky, New Jersey, Rhode Island and Wisconsin the statutes have been enacted or amended to conform to the Federal Law, which prohibits the manufacture, sale or prescription of malt liquors for medicinal purposes. Adding these to the twenty-nine States referred to above makes a total of thirty-five States where prohibition upon the prescribing of malt liquors obtains as a result of State legislative action.

The States of Massachusetts, Maryland, Nevada and New York have no State prohibition laws and therefore have no legislation upon the subject except in localities where local option statutes may be in force.

From the appended exhibit it will be noted that not only is the prescribing of malt liquors prohibited, but that in *twelve* States, Arizona, Idaho, Maine, New Mexico, North Dakota, Georgia, Kansas, Nebraska, North Carolina, Utah, Washington, West Virginia, *no intoxicating liquor of any kind may be prescribed*, while in *eleven* States, Alabama, Arkansas, Delaware, Florida, Indiana, Mississippi, Oklahoma, Oregon, South Carolina, Tennessee, Texas, pure *alcohol only* may be prescribed.

The power of the States to regulate the sale of liquors for medicinal purposes, to permit the sale of some forms and to prohibit others, has been sustained by the courts as a constitutional exercise of legislative authority to make effective their prohibitory laws.

#### THE POWER OF CONGRESS TO EFFECTIVELY PROHIBIT THE MANUFACTURE AND SALE OF BEVERAGE LIQUORS UNDER THE EIGHTEENTH AMENDMENT IS AS FULL AND COMPLETE AS THE POLICE POWER OF THE STATES TO ENFORCE SUCH PROHIBITION.

The character and extent of the power conferred upon Congress by the Eighteenth Amendment was the precise issue before the Supreme Court in the National Prohibition Cases, 253 U. S. 350.

The Eighteenth Amendment prohibits the manufacture and sale of intoxicating liquors. Congress in the National Prohibition Act had defined that term to in-

clude beverages containing as much as one-half of one per cent of alcohol by volume. It was insisted that the statute prohibited the manufacture and sale of beverages which were not in fact intoxicating and that because of this the statute was unconstitutional. The court held:

“Congress did not exceed its powers under U. S. Const., 18th Amend., to enforce the prohibition therein declared against the manufacture, sale, or transportation of intoxicating liquors for beverage purposes, by enacting the provisions of the Volstead Act of October 28, 1919, wherein liquors containing as much as one-half of one per cent of alcohol by volume, and fit for use for beverage purposes, are treated as within that power.”

It was also insisted that Congress had exceeded the authority conferred by the Amendment by making the prohibition apply to liquors manufactured prior to the date upon which the Amendment became effective. The court said:

“The power of Congress to enforce the Prohibition Amendment to the Federal Constitution may be exerted against the disposal for beverage purposes of liquors manufactured before the Amendment became effective, just as it may be against subsequent manufacture for those purposes.”

Even prior to the granting of an *express constitutional* power over the subject of intoxicating liquors, when Congress legislated upon the subject as an incident of some other constitutional power, full authority was possessed to make the power effective and the fact that such legislation had the character

of a police regulation was no objection to its validity. In the case of *Ruppert v. Caffey*, 251 U. S. 264, the Supreme Court held:

"The implied war power of Congress over intoxicating liquors extends to the enactment of laws which will not merely prohibit the sale of intoxicating liquors, but will effectively prevent their sale. \* \* \* When the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend an exercise by a State of its police power."

The attempted distinction between the character of the power possessed by the States over the subject of intoxicating liquor in the exercise of the police power and the nature of the power possessed by Congress under the Eighteenth Amendment is fundamentally unsound.

The regulations and prohibitions upon the medicinal use imposed by State law are the exercise of police power. The police power over intoxicating liquor is a single broad power to prevent the evils consequent upon their abuse and is not divisible into two component elements of a police power over the beverage use and a separate police power over the medicinal use. It is a single power sufficiently comprehensive to include in its exercise control and regulation over all the means thru which the evil at which it is directed may come into existence.

To prevent the beverage use the States found it necessary to regulate or prohibit the medicinal use. The Eighteenth Amendment was designed to prevent the same evil and to unite with the power of the

States the power of the Federal government. The nature of the power conferred upon the Federal government by the Amendment is of the same character as that possessed by the States.

Mr. Justice Brandeis in the case of *Ruppert v. Cafey*, 251 U. S. 264, 299, clearly and succinctly stated this proposition when he said:

“The police power of a State over the liquor traffic is not limited to the power to prohibit the sale of intoxicating liquors, supported by a separate implied power to prohibit kindred non-intoxicating liquors so far as necessary to make the prohibition of intoxicants effective; it is a single broad power to make such laws, by way of prohibition, as may be required to effectively suppress the traffic in intoxicating liquors.”

The duty of enforcing this prohibition against the traffic in intoxicating liquors for beverage purposes which was imposed upon Congress by the Eighteenth Amendment carries with it the full power to do all things necessary for its accomplishment. *U. S. v. Rhodes*, 1 Abb. U. S. 28; *Civil Rights Cases*, 109 U. S. 3; *U. S. v. Cruikshank*, 1 Woods 308.

Section 2 of the Eighteenth Amendment to the Constitution of the United States provides, among other things, that Congress and the several States shall have concurrent power to enforce this Article by “appropriate legislation.” “Appropriate legislation” as used in this section necessarily means such legislation as will tend to make this constitutional provision completely operative and effective.

The power conferred upon Congress by Section 2 of the Eighteenth Amendment is plain in its nature and commits to Congress the discretion to determine

the legislation necessary and appropriate to enforce the provisions of Section I of this constitutional amendment. Unless the enactment has no substantial relation to the enforcement of the constitutional prohibition of the manufacture, sale or transportation of intoxicating liquors for beverage purposes, a court has no power to determine the wisdom of the enactment or challenge the manner of the exercise by Congress of the authority and discretion confided to it by the second section of this constitutional amendment.

The authority to enact "appropriate legislation" conferred upon Congress by the Eighteenth Amendment to enforce the provisions of the Amendment very obviously means such legislation as will completely and effectively suppress what the Amendment treats as a public evil, to-wit, the traffic in intoxicating liquors for beverage purposes. *Rhode Island v. Palmer*, 253 U. S. 350; *Corneli v. Moore*, 257 U. S. 491; *Grogan v. Walker*, 259 U. S. 80; *Hoke v. U. S.*, 227 U. S. 309; *Gloucester Co. v. Pa.*, 114 U. S. 196; *Champion v. Ames*, 188 U. S. 321; *U. S. v. Ferger*, 250 U. S. 199; *U. S. v. Doremus*, 249 U. S. 86.

Congress, having been given full authority to make complete and effective the constitutional prohibition against the traffic in and the use of intoxicating liquors for beverage purposes, may very properly deem it wise to place limitations upon the use of intoxicating liquors and even prevent use of certain specified liquors for medical purposes so as to prevent the sale of such liquors for beverage purposes, as it is well known that the unrestrained traffic in liquor for alleged medicinal purposes results in great abuses and serves as a ready means of defeating the constitu-

tional prohibition against the use of same for beverage purposes.

As the power to completely and effectively prohibit the traffic in and use of intoxicating liquor for beverage purposes has been conferred upon Congress, to deny it the right to regulate the use of such liquor for non-beverage purposes or even absolutely forbid the use of certain such liquors for non-beverage purposes, might well destroy the power of Congress to enforce the prohibition in the Eighteenth Amendment against intoxicating liquors for beverage purposes. It is submitted that no such situation is contemplated by the Eighteenth Amendment.

On the contrary the power to make effective the constitutional prohibition against the traffic in intoxicating liquors for beverage purposes very obviously includes, if that power is to exist, the power to deal with abuses and obstructions to the constitutional prohibition such as the procuring of intoxicating liquors ostensibly for medicinal purposes but designed and intended for use for beverage purposes.

Congress in the exercise of its power has merely imposed such safeguards upon the use of intoxicating liquors by druggists and physicians as to render the exercise of its constitutional power to prohibit the traffic in intoxicating liquors for beverage purposes effective and operative. The object of the Act approved November 23, 1921, was not to regulate or restrict the calling of physicians or druggists nor in fact to prevent the use of intoxicating liquors for non-beverage purposes, but to regulate an abuse of, and to put an end to obstructions to, the general prohibition of the use of intoxicating liquors for beverage purposes, as contained in the Eighteenth Amendment and the National Prohibition Act.

## THE RIGHT TO MANUFACTURE, SELL OR POSSESS INTOXICATING LIQUORS IS NOT AN INHERENT RIGHT OF CITIZENSHIP.

This is definitely settled by the decisions of the Supreme Court. See Bartemeyer v. Iowa, 18 Wall. 129, 21 L. Ed. 929; Mugler v. Kansas, 123 U. S. 123, 31 L. Ed. 205; Kidd v. Pearson, 128 U. S. 1, 32 L. Ed. 346; Giozzi v. Tiernan, 148 U. S. 657, 37 L. Ed. 599; Barbour v. Georgia, 249 U. S. 454, 39 Su. Ct. Rep. 20, 63 L. Ed. 704; Crane v. Campbell, 245 U. S. 304, 62 L. Ed. 304.

## THERE IS NO INHERENT RIGHT TO PRACTICE MEDICINE WHICH IS NOT SUBORDINATE TO THE POLICE POWER.

This is well settled by the decisions of the United States Supreme Court. In Dent v. West Virginia, 129 U. S. 114, 32 L. Ed. 623, 626, 9 Su. Ct. Rep. 231, Mr. Justice Field said in speaking of the validity of the West Virginia statute providing a license and fixing the conditions upon which physicians might practice:

"\* \* \* But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society. \* \* \* The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. \* \* \* The same reasons which control in imposing conditions, upon compliance with which the physician is allowed to practice in the first instance, may call for further conditions as new modes of treating disease are discovered or a

more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances, or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected."

In *Gray v. State of Connecticut*, 159 U. S. 74, 40 L. Ed. 80, Mr. Justice Field in speaking for the Supreme Court in sustaining the validity of a liquor law which imposed additional qualifications upon a pharmacist already holding a license to practice pharmacy, said:

"A license to pursue any business or occupation from the governing authority of any municipality or State, can only be invoked for the protection of one in the pursuit of such business or occupation, so long as the same continues unaffected by existing or new conditions. The degree of care and scrutiny which should attend the pursuit of the business or occupation practiced will necessarily depend upon the safety and freedom from injurious or dangerous conditions attending the prosecution of the same.

"In the preparation of medicinal compounds, intoxicating liquors and even still more dangerous ingredients are often properly used; but the protecting care of the government, municipal or State, in their use, should never be relaxed beyond the bounds of absolute safety. The responsibility of the legal authority, municipal or State, cannot be stipulated or bartered away. Whatever provisions were prescribed by the law previous to 1890 in the use of spirituous liquors in the medicinal preparations of pharmacists, they did not prevent the subsequent exaction of further conditions which the lawful authority might deem necessary or useful.

"For reasons which were deemed sufficient after 1890 by the authorities of Connecticut, the use of

spirituous liquors in the preparation of pharmacists' compounds required still further provisions than those previously existing, and it was provided that such liquors could not be subsequently used in their preparation without the pharmacist first procuring a druggist's license from the county commissioners.

"The imposition by the court of a fine upon the accused for a disregard of this requirement trespassed in no way upon any of his rights under the Constitution of the State or the 14th Amendment of the Federal Constitution."

In *Watson v. Maryland*, 218 U. S. 172, 54 L. Ed. 987, Mr. Justice Day said in sustaining the statute of Maryland relating to the practice of medicine:

"\* \* \* The details of such legislation rest primarily within the discretion of the State legislature. It is the law-making body, and the Federal courts can only interfere when fundamental rights guaranteed by the Federal Constitution are violated in the enactment of such statutes."

See also *Reetz v. Michigan*, 188 U. S. 503, 47 L. Ed. 563; *Williams v. Arkansas*, 217 U. S. 77, 54 L. Ed. 673; *O'Neil v. State*, 115 Tenn. 427, 90 S. W. 27, 3 L. R. A., N. S. 762; *State v. Davis*, 194 Mo. 485, 92 S. W. 484, 4 L. R. A., N. S. 1023; *State v. Rosenkrans*, 30 R. I. 374, 75 Atl. 491, affirmed 56 L. Ed. 1263; *State v. Edmunds*, 127 Iowa 333, 101 N. W. 431.

CONGRESS PRIOR TO THE EIGHTEENTH AMENDMENT PROHIBITED THE INTRODUCTION OF LIQUORS INTO THE INDIAN COUNTRY. THESE ACTS CONTAINED NO EXCEPTIONS PROVIDING FOR MEDICINAL USE. THE ALASKA PROHIBITION LAW PERMITS ALCOHOL ONLY FOR MEDICINAL USE.

For the provisions relative to Indian lands see 3 Fed. Stat. Ann., 2nd edition, pages 913-924. The constitutionality of these acts has been sustained by the Supreme Court of the United States.

In *Perrin v. United States*, 232 U. S. 478, 58 L. Ed. 691, 694, the Supreme Court said:

“The power of Congress to prohibit the introduction of intoxicating liquors into an Indian reservation, wheresoever situate, and to prohibit traffic in such liquors with tribal Indians, whether upon or off a reservation and whether within or without the limits of a State, does not admit of any doubt.”

In *Hallowell v. United States*, 221 U. S. 317, 55 L. Ed. 750, it was held that a conviction would lie for introducing liquor into the Indian country notwithstanding the defendant was a citizen of the United States and entitled to rights, privileges and immunities of such citizen.

See also *Ex parte Webb*, 255 U. S. 663, 56 L. Ed. 1248; *United States Express Co. v. Friedman*, 191 Fed. 673; *Joplin Mercantile Co. v. U. S.*, 236 U. S. 531, 59 L. Ed. 705; *United States v. 43 Gallons of Whiskey*, 93 U. S. 188, 23 L. Ed. 846.

In the case of *United States v. Cohn*, the Court of

Appeals of Indian Territory (52 S. W. Rep. 38, 2 Ind. Terr. 474), had before it the duty of interpreting the Federal statute which forbade the sale within the Territory of a non-intoxicating liquor known as Rochester Tonic. The opinion at length discussed the right of the States in the exercise of their police power to prohibit the sale of such beverages and decided that whatever the States may do in that behalf Congress may do for the Territories. Since the adoption of the Eighteenth Amendment this same power is in Congress for all of the United States. After quoting the statute at length, the court said:

“No one can carefully read this statute, but that he will be impressed with the idea that Congress, whatever it omitted to do, intended to completely cover the whole case, and to erect a complete, an impregnable barrier against the introduction, sale, and use of intoxicating liquor in all of its forms, and to guard against all of the well known subterfuges resorted to deceive courts and juries in relation to the matter.”

See also Alaska Prohibition Statute, Act of February 14, 1917, ch. 53, 39 Stat. at L. 903.

#### **THE POWER TO PROHIBIT THE MANUFACTURE OR PRESCRIBING OF LIQUOR ABSOLUTELY BEING ESTABLISHED IT NECESSARILY INCLUDES THE LESSER POWER TO PERMIT CONDITIONALLY.**

The cases hereinbefore cited clearly establish the proposition that the States and Congress in order to effectuate the prohibition upon the beverage use may prohibit absolutely the manufacture or prescribing of

malt liquors for medicinal purposes. The power to prohibit absolutely the prescribing of certain forms of intoxicating liquors for medicinal use, when in the legislative judgment such prohibition is necessary for effective enforcement of the prohibition upon the beverage use, necessarily includes the lesser power to permit conditionally the prescribing of other forms of intoxicating liquors for medicinal purposes upon such conditions as the legislative body may deem necessary to effectively prohibit the beverage use. Such restrictions are valid. Both the 66th and 67th Congress regarded the prohibitions of the Federal prohibition statute relating to the prescribing of spirituous liquor and limiting the quantity which could be prescribed to one pint within ten days as both necessary and reasonable for the effective enforcement of the Eighteenth Amendment. Section 7 of the National Prohibition Act, as originally enacted, provided that not more than a pint of spirituous liquors, to be taken internally, should be prescribed for use by the same person within any period of ten days, and that such prescription should not be refilled. The same limitation was continued by the 67th Congress in Section 2 of the Supplemental Prohibition Act upon spirituous liquors, and extended in its application to the prescribing of vinous liquors.

The appellants cannot claim successfully that the Federal prohibition statutes which prohibit absolutely the prescribing of malt liquors but permitted the prescribing of vinous and spirituous liquors within the defined limitations constitutes an unjust discrimination against them. It is competent for the legislative body to fix the conditions necessary to effect the constitutional purpose, and the power to prohibit absolutely carries with it the power to permit conditionally.

This was the precise issue before the United States Supreme Court in the case of Clark Distilling Company v. Western Maryland R. Co., 242 U. S. 311, 61 L. Ed. 326. The facts in this case were that Congress, in the exercise of its power to regulate commerce among the States had enacted the Webb-Kenyon Law which provides:

“ \* \* \* That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, territory, or district of the United States, \* \* \* into any other State, territory, or district of the United States, \* \* \* which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, territory, or district of the United States \* \* \* is hereby prohibited.”

It was insisted in this case that while Congress had the power to prohibit the facilities of interstate commerce absolutely to the transportation of intoxicating liquor, nevertheless, it had exceeded its powers by prohibiting conditionally or by leaving the determination of whether such prohibition should apply, to the States. Mr. Chief Justice White in this case said that there was absolutely no doubt about the power of Congress to prohibit the transportation absolutely under its constitutional authority to *regulate* commerce. Upon this subject he said:

“ It is not in the slightest degree disputed that if Congress had prohibited the shipment of all in-

toxicants in the channels of interstate commerce, and therefore had prevented all movement between the several States, such action would have been lawful, because within the power to regulate which the Constitution conferred. *Lottery Case (Champion v. Ames)*, 188 U. S. 321, 13 Am. Crim. Rep. 561; *Hoke v. United States*, 227 U. S. 308, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913-E, 905."

In refuting the contention that the law was unconstitutional because Congress had not prohibited absolutely but merely conditionally, the Chief Justice said:

"We can see no reason for saying that although Congress, in view of the nature and character of intoxicants, had a power to forbid their movement in interstate commerce, it had not the authority to so deal with the subject as to establish a regulation (which is what was done by the Webb-Kenyon Law) making it impossible for one State to violate the prohibitions of the laws of another through the channels of interstate commerce. Indeed, we can see no escape from the conclusion that if we accepted the proposition urged, we would be obliged to announce the contradiction in terms that because Congress had exerted a regulation lesser in power than it was authorized to exert, therefore its action was void for excess of power."

The Chief Justice then declared that the exceptional nature of the subject treated was the justification for the action of Congress. He said:

"The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guaranties of the

Constitution but for the enlarged right possessed by government to regulate liquor has never, that we are aware of, been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which, under the constitutional guaranties, such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest, and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace."

Ohio ex rel. Lloyd V. Dollison, 194 U. S. 445, 48 L. Ed. 1062, 24 Sup. Ct. Rep. 703; Rippey v. Texas, 193 U. S. 504, 48 L. Ed. 767, 24 Sup. Ct. Rep. 516; Southern Exp. Co. v. State, 188 Ala. 454, 66 So. 122; American Exp. Co. v. Beer, 107 Miss. 528, 65 So. 581, Ann. Cas. 1916D, 127; State v. United States Exp. Co., 164 La. 112, 145 N. W. 451; State v. Doe, 92 Kan. 212, 139 Pac. 1170.

Every form of regulation implies a partial prohibition. The decisions of the State courts sustained by the United States Supreme Court clearly establish the right of a legislative body to prohibit absolutely the medicinal use of liquor in order to prevent the evils of the beverage use. The State statutes to this effect have been uniformly upheld. The power of Congress under the Eighteenth Amendment to make effective the prohibition upon the beverage use is no less than that of the State in the exercise of their police power. Merely because Congress has not seen fit to exert that power by laying an entire prohibition upon the prescribing of spirituous or vinous liquors for medicinal use but has seen fit to impose limitations not amount-

ing to a complete prohibition constitutes no valid constitutional objection to the provisions of the statute.

The characteristics of intoxicating liquor are such that it lends itself peculiarly to evasion of the law. It was both reasonable and necessary, if its sale was to be permitted for medicinal use, that regulations and conditions upon such use be imposed. The experience in the States demonstrated this. Because of this fact in nearly every State adopting prohibition prior to national prohibition the prescribing of liquor has been either prohibited altogether or limited to pure alcohol only.

**LEGISLATIVE ACTS ARE PRESUMED CONSTITUTIONAL. IN THE EXERCISE OF ITS POWER TO EFFECT A CONSTITUTIONAL PURPOSE CONGRESS IS THE JUDGE OF THE MEANS TO BE EMPLOYED AND THE NECESSITY WHICH OCCASIONS ITS EMPLOYMENT.**

It is well settled that statutory enactments, solemnly enacted by the legislative branch of the Government, are presumed to be constitutional, and the burden of proving any particular statute to be unconstitutional is upon the party attacking such statute. Every reasonable presumption will be made in favor of the validity of the statute and the statute will be upheld by the courts unless it is clearly shown to be unconstitutional; it has even been held that a Federal Statute will not be declared void by the courts unless it appears, *beyond a reasonable doubt*, that it is not within the constitutional power of Congress. See the case of the United States v. United Shoe Machinery Company, 234 Fed. 127, 143, wherein the court said:

"It is a well settled rule that the courts are slow to declare the acts of co-ordinate departments of the Government void, and unless it appears beyond a reasonable doubt that the act is violative of the fundamental law of the United States, the courts will uphold it."

See also the case of Interstate, etc., Railway Co. v. Mass., 207 U. S. 79, wherein the court, acting through Mr. Justice Holmes said:

"It is not enough that a statute goes to the verge of constitutional power. We must be able to see clearly that it goes beyond that power. In case of a real doubt, a law must be sustained."

In the case of Hamilton v. Kentucky Distilleries & Warehouse Company, 251 U. S. 146, 64 L. Ed. 194, in construing the War Prohibition Act, it was held:

"The Federal Supreme Court may not, in passing upon the validity of a Federal Statute, inquire into the motives of Congress, nor may it inquire into the wisdom of the legislation, nor may it pass upon the necessity for the exercise of a power possessed."

In Mugler v. Kansas, 123 U. S. 123, 31 L. Ed. 205, 210, it was said:

"\* \* \* If in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use, as a beverage would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. \* \* \*"

In the case of Fong Yue Ting v. United States, 149 U. S. 698, the court said:

"In exercising the great powers which the people of the United States by establishing a written Constitution as a supreme law of the land have vested in this court of determining, whenever the question is brought before it, whether the acts of the Legislature or Executive are consistent with the Constitution, it behooves the court to be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the Constitution to the other departments of the government."

No principle of constitutional law is more firmly established than that the courts may not, in passing upon the validity of a statute inquire into the motives of Congress. United States v. Des Moines Company, 142 U. S. 510; McCray v. United States, 195 U. S. 27; Weber v. Freed, 239 U. S. 325; Dakota T. Company v. South Dakota Company, 250 U. S. 163.

Nor will the court inquire into the wisdom of the legislation. McCulloch v. Maryland, 4 Wheat. 316; Gibbons v. Ogden, 9 Wheat. 1; Brushaber v. Union Pacific Railroad Co., 240 U. S. 1; Rast v. Van Deman Company, 240 U. S. 342.

Nor will the court pass upon the necessity for the exercise of a power possessed by the Legislature. Champion v. Ames, 188 U. S. 321.

In 1804 Chief Justice Marshall, in the case of United States v. Fisher, 2 Cranch. 358, in considering the powers conferred upon Congress by Article I, Section 8, Chapter 18, providing that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers,"

conferred by the Constitution laid down the fundamental law as follows:

"In construing this clause it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power.

"Where various systems might be adopted for that purpose it might be said with respect to each, that it was not necessary because the end might be obtained by other means. Congress must possess the choice of means and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution."

In 1816, Mr. Justice Story in the case of Martin v. Hunter, 1 Wheat. 304, in speaking of the Constitution, said :

"The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modification of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time to adopt its own means to effectuate legitimate objects, and to mold and model the exercise of its powers, as its own wisdom and the public interest should require."

In 1819, Chief Justice Marshall in the case of *McCulloch v. Maryland*, 4 Wheat. 316, said:

"But we think the sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. \* \* \*

"But where the law is not prohibited and is really calculated to effect any of the objects entrusted to the Government, to undertake here to inquire into the degree of its necessity would be to pass the lines which circumscribe the judicial Department, and to tread on legislative ground. This court disclaims all pretension to such a power."

In this connection see also the following cases: *Veazie Bank v. Fenno*, 75 U. S. 533; *Stewart v. Kahn*, 78 U. S. 493.

In the legal tender cases, *Knox v. Lee*, 79 U. S. 457, which involved the constitutional power of Congress to pass the legal tender acts, the court said:

"Before we can hold the Legal Tender Acts unconstitutional, we must be convinced they were not appropriate means, or means conducive to the execution of any or all of the powers of Congress, or of the Government, not appropriate in any degree (for we are not judges of the degree of appropriateness) or we must hold that they were prohibited."

In the case of McCrary v. United States, 195 U. S. 27, in which the Oleomargarine Act of 1886 making the manufacture of artificially colored oleomargarine subject to a special tax was before the court for consideration, Mr. Chief Justice White said:

"The decisions of this court from the beginning lend no support whatever to the assumption that the Judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted. \* \* \*

"The Judicial Department cannot prescribe to the Legislative Department limitations upon the exercise of its acknowledged powers.

"In determining whether a particular Act is within a granted power its scope and effect are to be considered; applying this rule to the Acts assailed it is self-evident that on their face they levy an excise tax; that being the necessary scope and effect it follows that the Acts are within the grant of power."

#### THE FIFTH AMENDMENT IMPOSES NO GREATER LIMITATION UPON CONGRESS THAN THE FOURTEENTH AMENDMENT DOES UPON THE STATES.

In Hamilton v. Kentucky Distilleries Company, 251 U. S. 146, 156, 64 L. Ed. 194, 199, Mr. Justice Brandeis said:

"But the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon State power. (Re Kemmler, 136 U. S. 436, 448, 34 L. Ed. 519, 524, 10 Su. Ct. Rep. 930; Carroll v. Greenwich Ins. Co., 199 U. S. 401, 410, 50 L. Ed.

246, 250, 26 Su. Ct. Rep. 66.) If the nature and conditions of a restriction upon the use or disposition of property are such that a State could, under the police power, impose it consistently with the Fourteenth Amendment, without making compensation, then the United States may for a permitted purpose impose a like restriction consistently with the Fifth Amendment without making compensation; for prohibition of the liquor traffic is conceded to be an appropriate means of increasing our war efficiency."

**THE EVIL SOUGHT TO BE PREVENTED BY THE EIGHTEENTH AMENDMENT IS THE SAME AS THAT SOUGHT TO BE PREVENTED BY THE STATES IN THE EXERCISE OF THEIR POLICE POWER. IF THE SUBJECT OF LEGISLATION BE DEBATEABLE THE LEGISLATURE IS ENTITLED TO ITS OWN JUDGMENT.**

The United States Supreme Court in the case of *Ruppert v. Caffey*, 251 U. S. 264, 64 L. Ed. 260, said:

"That the Federal government would, in attempting to enforce a prohibitory law, be confronted with difficulties similar to those encountered by the States, is obvious."

The evidence before the Judiciary Committee of Congress at the time the measure was being considered, the debates when the measure was on its passage, the figures showing the number of physicians who prescribed liquors, the provisions of the Constitutions and statutes of the States having prohibition prior to the adoption of the Eighteenth Amendment are strongly indicative that the overwhelming weight of

sentiment among the members of the medical profession is that malt liquors are not a necessary therapeutic agent.

Giving the utmost consideration to the expressions of the number of those who regard malt liquor as necessary for medicinal use, the best that can be said is that the matter is a debatable question. The United States Supreme Court has repeatedly held that whenever the evidence showed the subject of legislation enacted in pursuance of a constitutional power to be debatable that the court would not interfere with the judgment of the legislative body.

In the case of *Price v. Illinois*, 238 U. S. 447, 59 L. Ed. 1400, the Supreme Court had under consideration the pure food statute of Illinois prohibiting the sale of adulterated foods. The violation charged consisted of a sale, in Chicago, of a preservative compound known as "Mrs. Price's Canning Compound" alleged to be intended as a preservative of food and to be unwholesome and injurious in that it contained boric acid. The defense was made that the compound was an article of commerce, that it was properly labeled and that it was not injurious to health; that because of this the statute of Illinois, as construed by the court of that State which prohibited its sale, was a violation of the Fourteenth Amendment and of the Commerce Clause of the Constitution of the United States. Mr. Justice Hughes speaking of the power of the legislature to determine whether a commodity was a legitimate article of commerce or sufficiently injurious to require the exercise of the police power of the State, said:

"The contention of the plaintiff in error could be granted only if it appeared that by a consensus

of opinion the preservative was unquestionably harmless with respect to its contemplated uses; that is, that it indubitably must be classed as a wholesale article of commerce so innocuous in its designed use and so unrelated in any way to any possible danger to the public health that the enactment must be considered as a merely arbitrary interference with the property and liberty of the citizens. It is plainly not enough that the subject should be regarded as debatable. If it be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury upon the issue which the legislature has decided."

In the case of Hebe Company v. Shaw, 248 U. S. 294, 63 L. Ed. 255, Mr. Justice Holmes, in speaking for the court in the opinion sustaining the validity of the Ohio statute prohibiting the sale of skimmed milk, said:

"If the character or effect of the article as intended to be used 'be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury,' or, we may add, by the personal opinion of judges, upon the issue which the legislature has decided.' Price v. Illinois, 238 U. S. 446, 452, 59 L. Ed. 1400, 1405, 35 Sup. Ct. Rep. 892; Rast v. Van Denman & L. Co., 240 U. S. 342, 357, 60 L. Ed. 679, 687, L. R. A., 1917A, 421, 36 Sup. Ct. Rep. 370, Ann. Cas. 1917B, 455."

See also Central Lumber Company v. South Dakota, 226 U. S. 164, 57 L. Ed. 167; Keokee Consolidated Coke Company v. Taylor, 234 U. S. 224, 58 L. Ed. 1288; Erie Railroad Company v. Williams, 233 U. S. 685, 58 L. Ed. 1155; Armour Company v. North Dakota, 240

U. S. 510, 60 L. Ed. 771; *Rast v. Van Deman & Lewis Company*, 240 U. S. 342, 60 L. Ed. 679, 687.

THE EIGHTEENTH AMENDMENT CONFERRED  
NO NEW RIGHT TO MANUFACTURE OR  
PRESCRIBE INTOXICATING LIQUORS.

Such rights as were possessed in this respect were guaranteed by prior provisions of the Constitution. Similar statutes of Congress and of the States prohibiting or regulating the manufacture or prescribing of liquors have been held not violative of any pre-existing constitutional right. It must follow that the National Prohibition Act and Supplemental Prohibition Act enacted pursuant to the Eighteenth Amendment constitute a valid exercise of constitutional power to effect a like purpose and cannot be declared unconstitutional without thereby in effect overruling all former decisions and invalidating all constitutions, statutes and ordinances providing similar or more restrictive regulations upon the manufacture or prescribing of liquor for medicinal purposes.

CONGRESS INVESTIGATED THE ALLEGED  
THERAPEUTIC PROPERTIES OF BEER.  
THE OVERWHELMING TESTIMONY OF  
PHYSICIANS, DRUGGISTS AND BREWERS  
SHOW THAT BEER HAD NO MEDICINAL  
VALUE.

See Prohibition legislation 1921, hearing before Committee of the Judiciary of the House of Representatives on H. R. 5033, Serial No. 2, May 12, 13, 16, 17, 20, 1921.

On pages 12 to 15 appears a petition in the following words signed by one hundred eminent physicians and scientists:

"The undersigned physicians of the United States desire to place on record their conviction that the manufacture and sale of beer and other malt liquors for medicinal purposes should not be permitted. Malt liquors never have been listed in the United States Pharmacopoeia as official medicinal remedies. They serve no medical purpose which cannot be satisfactorily met in other ways, and that without the danger of cultivating the beverage use of alcoholic liquor."

See also the petition of over 400 leading physicians of the State of Massachusetts, pages 316 to 325.

Also petition of leading physicians of State of Indiana, page 324.

Also following action by the Ohio State Medical Association, page 138:

"The Ohio State Medical Association, representing 4,500 regular physicians endorses overwhelmingly the prohibition of the liquor traffic for beverage purposes, and can see no excuse for the use of beer or other malt liquors as medical remedies. Personally, as a teacher in a medical school I have taught for years that any supposed indications for their use could be satisfactorily met in other ways.

"J. H. J. UPHAM,

"Chairman Committee on Public Policy and Legislation, Professor of Medicine, Ohio State University."

See also exhibit showing that out of 152,627 physicians in the United States 78% had not taken out permits to prescribe any form of intoxicants. Page 15.

See also testimony of Dr. Harvey Wiley, former President of the United States Pharmacopoeia Convention. Pages 296 to 301.

Also testimony of Doctor Howard A. Kelly, Emeritus Professor, Johns Hopkins University, Baltimore, Md. Pages 97 to 99.

Also testimony of Dr. James M. H. Rowland, formerly Professor of Obstetrics, University of Maryland, pages 99 to 104.

The attitude of the druggists is shown by the following as submitted by the executive committee of Nat'l Ass'n of Retail Druggists, page 15:

"The executive committee of the National Association of Retail Druggists of the United States desire to place on record their conviction that the manufacture and sale of beer and other malt liquors for medicinal purposes should not be permitted. Malt liquors have never been listed in the United States Pharmacopoeia as official medicinal remedies.

"Attest:

"SAMUEL C. HENBY, *Secretary.*"

See also the attitude of the druggists of northern Ohio set forth on page 10 of the report of the hearing.

Mr. Oliver T. Remmers, attorney for Anheuser-Busch Company of St. Louis, one of the largest breweries in the United States, said on page 40:

"As Attorney for Anheuser-Busch (Inc.) of St. Louis, formerly the largest manufacturer of beer in the world, without relinquishing the principles we have always maintained, I am authorized to speak in favor of the enactment of this amendment forbidding the manufacture and sale of beer for medicinal purposes for the following vital and fundamental reasons:

"Authorization of the sale of beer for medicinal purposes, under the provisions of the present enforcement act, will make it absolutely impossible to enforce the prohibition laws. \* \* \*"

Only one physician appeared before the Committee in advocacy of beer as a medicine. See his testimony on page 58. His attitude was repudiated by the Medical Society of the State of New York; see telegram on page 325.

Reports to the Prohibition Unit in the Treasury Department show that retail druggists throughout the country filled 11,268,469 physicians' official prescriptions for liquor during the fiscal year ended June 30, 1923.

*Of the total number of prescriptions, New York issued 3,638,751 and Illinois issued 2,168,788. The total number of prescriptions issued in these two states was 5,807,539 compared with 11,268,469 for the entire country, or one-half of the total number.* Furthermore, there are approximately 16,500 physicians in the State of New York. According to departmental reports only 9,038 hold permits to prescribe liquors. This is approximately 54 per cent of the total number of physicians in the State. A corresponding proportion obtains in Illinois. *This would indicate that 54 per cent of the physicians in these two States issued one-half of all the prescriptions in the United States for medicinal liquor during the last year.*

The total quantity of whiskey sold on prescription throughout the country was 1,347,573 gallons. In New York 442,996.24 gallons of whiskey were sold on prescription; in Illinois 269,070.20 gallons were sold. In other words, 54 per cent of the physicians in these two States, containing 15 per cent of the population, pre-

scribed a total of 712,066.44 gallons of whiskey as compared with a total of 1,347,573 gallons for the entire country. *This indicates that 54 per cent of the physicians in these two States prescribed more than half or 52 per cent of all the whiskey used for medicinal purposes in the country during the year.*

This reveals the fact that the Federal prohibition act does not unduly hamper the issuing of prescriptions for intoxicating liquor. It also proves beyond the question of a doubt that if these limitations are invalid, and similar state limitations void, as declared by opposing counsel, it would furnish the means and the device by which the purpose of the Eighteenth Amendment could be subverted.

### CONCLUSION

The Eighteenth Amendment conferred no right to manufacture or prescribe liquor for medicinal purposes. Twenty-nine States have by their constitutions or statutes prohibited the manufacture or prescribing of malt liquors for medicinal purposes. Congress in legislating with reference to the territories and Indian lands had prohibited such use prior to the Eighteenth Amendment because experience had shown such prohibition to be necessary to effectively prevent the beverage use, and these statutes have been sustained by the courts as not violative of any constitutional right.

It is therefore respectfully submitted that it cannot be said that the provisions of the Supplemental Prohibition Act, enacted for the enforcement of the Eighteenth Amendment to the Constitution, and which prohibits absolutely the manufacture or prescribing of malt liquors for medicinal purposes, are either arbitrary or unreasonable or without proper relation to the

constitutional purpose, especially in view of the overwhelming weight of the testimony of the physicians who would have the privilege of prescribing such liquors, the druggist who would have the privilege of selling them and the brewers who would have the privilege of manufacturing them, to the effect that beer is not a medicine. For these reasons the judgment in these cases should be affirmed.

HARWELL G. DAVIS, Attorney General, Alabama,  
J. S. UTLEY, Attorney General, Arkansas,  
RIVERS BUFORD, Attorney General, Florida,  
EDWARD J. BRUNDAGE, Attorney General, Illinois,  
U. S. LESH, Attorney General, Indiana,  
BEN J. GIBSON, Attorney General, Iowa,  
CHAS. B. GRIFFITH, Attorney General, Kansas,  
THOMAS B. McGREGOR, Attorney General, Kentucky,  
RANSFORD W. SHAW, Attorney General, Maine,  
ANDREW B. DOUGHERTY, Attorney General, Michigan,  
CLIFFORD L. HILTON, Attorney General, Minnesota,  
JESSE W. BARRETT, Attorney General, Missouri,  
CLAYTON D. POTTER, Attorney General, Mississippi,  
WALLINGTON D. RANKIN, Attorney General, Montana,  
O. S. SPILLMAN, Attorney General, Nebraska,  
MILTON J. HELMICK, Attorney General, New Mexico,  
GEORGE F. SHAFER, Attorney General, North Dakota,  
C. C. CRABBE, Attorney General, Ohio,  
GEORGE F. SHORT, Attorney General, Oklahoma,  
I. H. VAN WINKLE, Attorney General, Oregon,  
GEORGE W. WOODRUFF, Attorney General, Pennsylvania,  
BUELL F. JONES, Attorney General, South Dakota,  
FRANK M. THOMPSON, Attorney General, Tennessee,  
E. T. ENGLAND, Attorney General, West Virginia,  
DAVID J. HOWELL, Attorney General, Wyoming,

*Attorneys, Amici Curiae.*

## APPENDIX

**A BRIEF SUMMARY OF PROVISIONS OF THE LAWS OF THE SEVERAL STATES RELATING TO PRESCRIBING INTOXICATING LIQUOR.****ALABAMA:**

Pure alcohol only may be prescribed in a quantity not to exceed one-half pint upon a single prescription. Physicians desiring to prescribe alcohol must make an affidavit before the judge of the probate court of the county in which said physician practices, stating that he is duly licensed practitioner and that he will prescribe alcohol in accordance with the provisions of the law which are set forth in the affidavit required to be filed. For this a fee of twenty-five cents is allowed the clerk receiving the affidavit. Prescriptions must be written in accordance with a form prescribed by statute. They must contain the name and address of the physician, the name and address of the patient, the date of issuance and the number of like prescriptions written for the same patient within the preceding twelve months, the disease or malady from which the patient is suffering and set forth the quantities of dose and method of use or administration. Such prescriptions may be issued only after an actual examination of the patient and a copy signed by the physician must be immediately filed with the probate judge who shall preserve the same and deliver all such prescriptions to the next grand jury for examination. Act of 1919, No. 7, Secs. 5, 6, and 7.

**ARIZONA:**

There is no provision for the sale of intoxicating liquor or alcohol as a medicine either upon prescription or otherwise except that extracts, remedies, etc., which do not contain more alcohol than is necessary for the legitimate purposes of extraction, solution, or preservation and which contain drugs in sufficient quantity to medicate such compounds and which are sold for legitimate and lawful purposes, may be manufactured and sold. Laws 1917, Chap. 63, Sec. 2.

**ARKANSAS:**

A physician may prescribe alcohol only to the sick under his charge when he may deem the same necessary, but before issuing any prescriptions the physicians must file with the clerk of the county in which he resides an affidavit certifying that he will not prescribe or furnish any alcohol to any one except when in his judgment it is necessary treatment of the disease with which the patient is at the time afflicted. Secs. 6028-6029 of Code and Amendments of 1919, Chap. 87, Sec. 17.

**CALIFORNIA:**

The enforcement code passed by the Legislature in 1921, known as the Wright Act (St. 1921, p. 79), adopts the Volstead Act by reference. It was approved by the voters upon referendum at the election November 7, 1922. Sustained by the Supreme Court of California in *Ex parte Burke*, decided January 9, 1923.

**COLORADO:**

Registered physicians may prescribe intoxicating liquor for an amount not to exceed four ounces on numbered forms furnished by the Secretary of State and when issued shall be signed by the physician, giving his true, full name, address, date and hour of issuance, and shall state particularly the disease or malady for which prescribed, and true name and address of the patient and the number and date of previous prescriptions to such person within the year next preceding. The prescription must be filled within forty-eight hours of its issuance. Only one sale may be made on a single prescription and the pharmacist filling the same must preserve them open to public inspection for at least two years. Chap. 98, Laws 1915 as amended by Chap. 82, Laws 1917.

**CONNECTICUT:**

Every physician holding a permit from the United States Government to prescribe spirituous and intoxicating liquors may do so. Penalty for violating the provision of the act. Acts 1921, Chap. 291, Sec. 4, p. 3277.

**DELAWARE:**

Physician must be in good standing in his profession and not addicted to the use of intoxicating liquor or drugs. Must personally make a careful examination of the person for whom prescribed. May prescribe pure grain or ethyl alcohol only and copy of prescription must be pasted upon bottle. Act of 1919, Chapter 239, Secs. 4, 8 and 14.

**DISTRICT OF COLUMBIA:**

Intoxicating liquors may be prescribed by a duly licensed and regularly practicing physician upon a written and bona fide prescription. Such prescription shall contain a statement that the disease of the patient requires such a prescription and must be duly signed by the physician issuing. The pharmacist filling such prescription must give it a serial number, cancelling same by writing the word "cancelled" on it, the date on which it was presented and filled and must keep the same on file in consecutive order subject to public inspection at all times during business hours. Such prescriptions cannot be refilled. The pharmacist is required to keep a record book setting forth the date of the sale, the name of the purchaser, who is required to sign his name in this book opposite the entry relating thereto, give the street and house number if there by such. The record must show the kind, quantity and price, purpose for which sold and the name of the physician issuing the prescription. This record book can be required to be produced before the Commissioners of the District or the courts when required. Comp. St. 1918, Ann. Sup. 1919, Secs. 3421- $\frac{1}{4}$ A-3421- $\frac{1}{4}$ S.

**FLORIDA:**

A physician regularly licensed to practice his profession by the State Board of Medical Examiners may prescribe pure alcohol in quantities not exceeding eight ounces at any time for medicinal purposes. To write the prescription the physician must have either a professional knowledge of the case or have made an actual examination of the patient. Prescriptions must be written in substantial compliance with a form set forth

in the statutes, can be filled only by pharmacists regularly licensed under the laws of the State, only upon the day of issuance or next succeeding day. Cannot be refilled, nor can any one person have more than one such prescription filled in any one day. The prescriptions are required to be preserved as a record by the druggist subject to inspection by officers charged with the enforcement of the law. Act of 1919, Chap. 7890 (No. 108), p. 238, amending Sec. 5 of Chap. 7736, Acts of 1918 (Extra Session).

#### GEORGIA :

Pure alcohol may be prescribed but alcohol so prescribed must be so medicated as to render it absolutely unfit for use as a beverage. When dispensed upon prescription the druggist will be held absolutely responsible as to the sufficiency of the medication. (Laws 1919, No. 139, Sec. 4, p. 123.)

#### IDAHO :

There seems to be no provision for prescribing alcohol or liquor in any form for medicinal use. Pharmacists wanting a permit may procure it for compounding medicine, but no provision for prescription as a medicine either in Laws of 1915, Chap. 11, or Laws 1921, Chap. 50, regulating purchase and transportation of alcohol. The later act provides that physicians may purchase for manufacturing, laboratory or scientific purposes only pure alcohol upon the execution of a verified requisition in quadruplicate before the probate judge of the county upon a form to be furnished by the Secretary of State at cost.

**ILLINOIS:**

Physicians upon obtaining a permit granted by the Attorney General may prescribe liquor except wine, beer or alcoholic malt liquor after a careful physical examination of the patient, in a quantity not to exceed one pint for the same patient within a period of ten days. Such prescriptions cannot be refilled. Physicians issuing such prescriptions must keep an alphabetically arranged book to be supplied by the officer issuing the permit which shall show the date of issuance of each prescription, amount prescribed, to whom issued, the purpose or ailment for which issued and directions for its use, stating the amount and frequency of the dose. Laws, 1921, Chap. 43, Sec. 8.

**INDIANA:**

Licensed physicians may prescribe grain or ethyl alcohol only for medicinal purposes. The prescription must contain the name and address of the physician, the kind and quantity of liquor prescribed, the name of the person for whom prescribed, the date on which the prescription is written and directions for the use of the liquor as prescribed. Laws, 1917, Chap. 4, Sec. 13, as amended by Laws, 1921, Secs. 2 and 3.

**IOWA:**

Physicians may procure intoxicating liquor, not including malt liquors, and dispense the same to patients actually sick. They may purchase such liquor from pharmacists who hold a permit from the county auditor authorizing them to sell liquor for medicinal purposes. Citizens not addicted to the use of liquor may purchase liquor for medicinal purposes from pharmacists hold-

ing permits to sell for such purposes by making an application to purchase upon a blank required to be kept by permit holders supplied by the county auditor. This request must show the applicant not a minor, must give name, residence and street number, the amount required and for what use desired. The applicant must be personally known to the permit holder or identified by a subscribing witness to the application.

There appear to be no statutory requirements relative to prescriptions but the Commissioners of Pharmacy of the State are empowered to make rules and regulations to carry into effect the law. Code of 1913, Secs. 2386, 2395 and 2401.

#### KANSAS:

Under Section 5499 of the General Statutes of 1915 wholesalers may sell alcohol to retail druggists for medicinal purposes in quantities of not less than one nor more than five gallons. Also the Bone Dry Act, Chapter 215, Laws of 1917, page 283 contains a similar provision but the retailer must file with the carrier and with the County Clerk a statement showing the date, the quantity and for what purpose such alcohol is to be used. The statement to the Clerk must be filed within ten days after delivery. Hospitals may procure alcohol upon the same conditions. There is no provision for the sale of medicinal liquor at retail upon prescription.

#### KENTUCKY:

Physicians may issue and pharmacists may fill prescriptions for intoxicating liquors, under the restrictions of the National Federal law. Every physician

who issued prescriptions under the Act shall keep duplicates on file in alphabetical order in his office for two years after the date thereof, to be open to the inspection of the County attorney and Commonwealth attorney of the district. The prescription shall state the name and address of the patient, the druggist to whom addressed; the amount required; that the physician is in personal attendance; that the liquor is necessary in the proper treatment of the ailment and shall show the date and name and address of the physician. Laws 1922, Chap. 33, Secs. 32, 33 and 34.

#### LOUISIANA:

Laws 1921, Act No. 39, for enforcing 18th Amendment, contains no provisions relative to prescribing liquor. State governed by Federal law.

#### MAINE:

There is no provision for the sale of medicinal liquor upon prescription. The Code of 1916, Chap. 20, Sec. 17, makes it unlawful for apothecaries to sell intoxicating liquor.

#### MARYLAND:

No general State provision. (Local option laws certain counties.)

#### MASSACHUSETTS:

No general provisions. In some local option territories, pharmacists may sell liquors upon prescription. Sup. Rev. L., p. 770.

**MICHIGAN:**

Any physician lawfully practicing in the State may prescribe intoxicating liquors not to exceed eight ounces. The prescription must state the name and address of the patient, full directions for taking or using, the number of prescriptions the physician has given to the patient within the year preceding and that after a special diagnosis that the physician is satisfied that the intoxicating liquors were necessary to the health of the patient. Acts 1919, No. 53, Sec. 19.

**MINNESOTA:**

Physicians may prescribe intoxicating liquor not exceeding one pint in ten days for the same patient. The prescription must be written in ink, printed or type-written. It must state the name and address of the patient, the kind and quantity of liquor, directions for its use and that the illness for which the liquor is prescribed requires its use. The prescription must be signed in ink and show the date of its issuance and delivery. A prescription cannot be filled after ten days from the date of its issuance and cannot be refilled. Laws 1919, Chap. 455, as amend. Laws 1919,, Ex Sess., Chap. 65, and Laws 1921, Sec. 7.

**MISSISSIPPI:**

Physicians may prescribe pure alcohol in quantities not exceeding one-half pint. The prescription must be written in substantial compliance with a form provided by law. It must be filled the day of issuance or the following day and cannot be refilled. The physician must make an actual examination of the patient.

The pharmacist is required to preserve prescriptions for alcohol and file them at the end of each month with the clerk of the circuit court. Laws 1908, Chap. 113, Sec. 3.

#### MISSOURI:

Physicians may prescribe ethyl alcohol or wine or any other intoxicating liquor in lieu thereof if such physician shall file application with the clerk of the county court in which such physician practices upon a form to be prescribed by the attorney general, in which event the judge of the county court may issue a permit to prescribe upon the same rules and conditions as they are authorized to issue permits to manufacture and sell ethyl alcohol or wine. For this a fee of three dollars is charged, to be paid into the county treasury. Physicians must make a careful physical examination of the patient before issuing such a prescription. The prescription must show the name of the patient, the disease or malady, the date of issuance and state that the liquor is prescribed as a necessary remedy. The druggist filling such prescription is required to attach a copy of the prescriptions filled during each month to the report filed with the clerk of the county court. Laws of 1919 as amended by General Assembly of 1921, Secs. 6592 and 6592-a. "In no case shall any physician holding a permit to write such prescriptions prescribe for any one person more than eight fluid ounces of ethyl alcohol, one quart of wine, or one pint of whiskey (nor) with greater frequency than authorized by Federal law." Laws 1923, Sec. 10, p. 239.

**MONTANA:**

Physicians regularly licensed, holding permits from the Federal government to prescribe liquor as a medicine may record such permit with the Secretary of State of Montana upon the payment of \$2.00. This officer is required to countersign the permit or a certified copy and keep a record thereof whereupon the physician may prescribe not more than one pint of spirituous liquors to be taken internally for use by the same person within a period of ten days. The prescribing of malt liquors containing in excess of one-half of one per centum of alcohol by volume is expressly forbidden. Such prescriptions can be written only after a careful physical examination, or if such examination is found impracticable, then upon the best information obtainable and if the physician in good faith believes that the use of liquor as a medicine by such person is necessary. (Laws 1919, Ex. Sess., Sec. 6.)

**NEBRASKA:**

Regularly licensed physicians may issue prescriptions requiring the use of intoxicating liquors for his own patients provided the other ingredients with which it is mixed or compounded are of such character, and used in such quantities as to render the same unfit for use as a beverage. All such prescriptions shall be on numbered forms, furnished, dated and signed by the physician issuing, stating specifically the ingredients and the liquor and giving the name of the person for whom the prescription is issued. The pharmacist filling such prescriptions must preserve them as a record subject to inspection by the county attorney and the governor. Acts of 1917, Chap. 187, Sec. 25.

**NEVADA:**

Code of 1923 adopting Federal Code by reference held invalid by State Supreme Court.

**NEW HAMPSHIRE:**

Physicians may prescribe intoxicating liquor. The prescription to be written in accordance with a form prescribed by law. The prescription must show the name of the patient, the quantity of liquor, the kind, and give directions as to the amount and frequency of the dose. Such prescriptions must be written only after diagnosis of the disease exercising the same professional skill and care as on prescribing any poisonous or habit forming drug. The pharmacist filling the same must purchase such medicinal liquor from the State liquor agent who is made responsible for the quality of the liquor supplied to druggists. The druggist must also keep a record in which the person having the prescription filled must sign giving his residence address. This record and the prescriptions must be kept open to inspection by enforcement officers. Laws 1919, Chap. 147, Secs. 2, 10 and 12.

**NEW JERSEY:**

Physicians in active practice in the State holding permits from the Federal Government may have the same countersigned by the county clerk whereupon he may prescribe liquor for medicinal purposes, upon compliance with the provisions of the Federal law, Session Laws 1921, Chap. 150, Secs. 20-b, 28, 29, 44 and 45.

**NEW MEXICO:**

Pure grain alcohol only may be sold for medicinal use. Article XXIII amending State Constitution and Chapter 16, Laws 1920. The Legislature of 1923 by Chapter 118 adopted the limitations in the Volstead Act by reference.

**NEW YORK:**

Mullan-Gage law 1921, Chap. 155, Sec. 1214, repealed by Act 1923. No provisions of State law.

**NORTH CAROLINA:**

Session Laws 1923, Senate Bill 631, ratified and effective February 27, 1923, provides that duly licensed physicians, dental surgeons and druggists may receive grain alcohol only to be used in the compounding, mixing or preserving of medicines or medicinal preparations or for surgical purposes. Section 18 of the Act makes it unlawful for any druggist or pharmacist to sell or otherwise dispose of for gain, any intoxicating liquor.

**NORTH DAKOTA:**

Session Laws of 1923, H. B. 50, Section 2-B provides that no physician shall issue any prescription for intoxicating liquors as such, but a physician holding a Federal permit may personally superintend or supervise the administration of intoxicating liquors to his patients where the immediate use of such liquors is necessary to afford relief for some disease, providing that not more than one pint of such liquor may be administered to any one patient within a period of ten

days and no physician shall obtain more than five gallons of such liquor during the calendar year.

#### OHIO:

A physician holding a Federal permit may within ten days of the receipt thereof file a copy with the Commissioner of Prohibition of Ohio, who is required to keep an indexed record of such permit holders. Thereupon such physician may prescribe pure grain or ethyl alcohol or spirituous liquors in quantities not to exceed one-half pint in any period of ten days, for the aged, infirm and known sick. Laws 1921, Secs. 6212-15-2 and 6212-15-b.

#### OKLAHOMA:

Pure grain alcohol only may be prescribed for medicinal purposes. The governor is authorized to prescribe rules and regulations governing its sale. Session Laws of 1911 as amended by Laws 1913, Chap. 70, Sec. 1; Comp. St. 1921, Sec. 6982.

#### OREGON:

Physicians may prescribe ethyl alcohol only upon prescription, if a licensed physician in good standing, actually engaged in the practice of his profession. The prescription must be dated the actual date of issuance. They must be numbered consecutively during each calendar month, the number of each prescription to appear plainly upon its face. It must show the general nature of the ailment, the name and address of the patient and of the physician and must be written in duplicate and on or before the tenth of each calendar month carbon copies must be filed with the clerk of the

county, of all prescriptions issued during the month, together with an affidavit certifying that the prescriptions filed constitute a full report of all alcohol prescribed during the month. Provision is also made whereby the physician may procure and administer alcohol to patients in certain cases, but not to be sold by such physician. General Laws 1917, Chap. 40, Sec. 2.

#### PENNSYLVANIA:

No provisions of State law.

#### RHODE ISLAND:

No physician shall prescribe except upon obtaining a Federal permit. Acts 1922, Chap. 2231, Sec. 4.

#### SOUTH CAROLINA:

Pure alcohol only may be prescribed in quantities not exceeding one-half pint. The physician must write his prescription in substantial compliance with a form set forth in the statute. Such physician must be a regular practicing physician of the State. He must make an actual examination of the patient and may prescribe alcohol only when in his professional judgment the use of such alcohol is absolutely necessary to alleviate or cure the disease from which the patient is suffering. Such prescriptions can be filled only upon the day of issuance or the following day and may not be refilled nor can they be filled at any drug store in which the physician is financially interested. The alcohol can be delivered by the druggist only to the patient or to some one authorized by the physician to receive it, except in the case of minors in which event it may be delivered to the parent or guardian of such minor. Prescrip-

tions must be preserved by the druggist, recorded and indexed and at the end of each calendar month filed with the clerk of the court of the county in which such drug store is located. The record and prescriptions are required to be kept subject to inspection by the enforcement officers. Criminal Code of 1921, Secs. 797, 798 and 802.

#### SOUTH DAKOTA:

Physicians in active practice, of good moral character, may make application to the State Sheriff for a permit to prescribe spirituous or vinous liquors. That officer may in his discretion grant such permit upon the payment of a fee of one dollar. For violation of the terms of the permit the State Sheriff may revoke such permit in which event the physician may appeal to the appeal board consisting of the Governor, Attorney General, and State Sheriff. (Sec. 10255 Revised Code of 1919.) Prescriptions for spirituous and vinous liquor must be written in ink, indelible pencil or on a typewriter, shall be signed by the physician and shall have on it the number of the physician's permit, the date of issuance, the name of the patient, that it is needed for actual sickness, the name of the ailment or disease, the kind and quantity of liquor prescribed, the dose, the number of prescriptions written for the same patient and the total amount prescribed during the preceding three months. The physician must retain a carbon duplicate and on the original must stamp the word "Original" and upon the carbon the word "Copy." Each prescription must be in numerical order and the number on the carbon must correspond with that on the original. The physician must

also keep a record of such prescriptions showing the name and residence of the patient, the date filled, the kind of liquor prescribed, the quantity, the disease and total quantity prescribed by him for such patient during the preceding three months. This record to be open to inspection during business hours by enforcement officials. On or before the 5th of each month duplicate copies of this record with the carbon copies of the prescriptions together with an affidavit certifying the same constitute a true, full and correct statement of all prescriptions issuing during the month must be filed with the county auditor who shall file one record in his office and forward them to the State Sheriff. Revised Code of 1919, Secs. 10273, 10274 and 10275.

#### TENNESSEE:

Physicians of good standing actually engaged in the practice of the profession and not of intemperate habits, may prescribe alcohol only in quantities not exceeding one pint for medicinal use. Such prescriptions may not be filled after three days of the date of issuance, must be written in triplicate, contain the name of the patient, the address, directions for use, must be signed by the physician, and give his address. The physician is required to keep one copy of such prescription for a period of two years and on or before the eighth day of each month must mail one copy of all such prescriptions issued by him during the previous calendar month to the Pure Food and Drug Department of the State. The druggist is also required to keep a record of all such prescriptions filled. Such records are to be kept open to the inspection of enforcement officers. Laws 1917, Chap. 68, Secs. 4, 5 and 6.

**TEXAS:**

Physicians may prescribe pure alcohol only in quantities not exceeding one pint. In order to do so the physician must procure a permit from the Comptroller of Public Accounts for which a fee of five dollars is charged. That officer is required to furnish at cost to the physician the necessary prescriptions and record books. The prescriptions are required to be in book form numbered serially from one to one hundred and each book to be given a number with a stub carrying the corresponding number and data as the prescription bearing that number. The book containing the copy of such stub must be returned to the Comptroller of Public Accounts along with all defaced blanks written six months after the date of delivery of such book. Physicians must make a careful, personal, physical examination of the patient before issuing such a prescription, which is valid only when written upon the prescribed form. No such prescription may be filled at any drug store in which such physician has any financial interest. Physicians issuing prescriptions for alcohol must preserve a record of such prescriptions, a copy of which record must be filed with the Comptroller of Accounts not later than the fifth day of the month for the quarter preceding. Act 1919, 36 Legislature 2nd Called Session, Chap. 78, Secs. 13, 14 and 19; Penal Code 1920, Chap. 6-A.

**UTAH:**

No physician may prescribe any compound containing in excess of one-half of one per centum of alcohol by volume which is capable of being used as a beverage, or prescribe any medicine containing in total con-

tent of such prescription more than four ounces of alcohol and such prescription may not be refilled within seven days. Sec. 3370 Comp. Laws of 1917, p. 687, being Sec. 30 of Laws of 1917, Chap. 2.

#### VERMONT:

Provides that physicians holding permits from the Federal government to prescribe liquor for medicinal use may within ten days of the receipt of such permit file a copy thereof with the Secretary of State whereupon such physician may prescribe liquor as a medicine upon the limitations of the Federal Law. Secs. 4 and 5, Session Laws 1921 No. 204.

#### VIRGINIA:

Under the State law physicians may prescribe not exceeding two quarts of alcohol, or one gallon of malt or vinous liquors, or one quart of brandy or whiskey. Acts of 1918, Chapter 388, Secs. 8-c and 13. The requirements of the State laws as to prescriptions are not given as in 1920 the legislature by Act of 1920 Chapter 403 provided that whenever prescriptions were issued and filed in accordance with the National Prohibition Act the State prescription should not be required.

#### WASHINGTON:

No provision made for the issuance of prescriptions for intoxicating liquors or alcohol. Licensed physicians may procure alcohol upon securing a permit from the county auditor and may administer the same to their patients, but it is unlawful for a physician to administer diluted alcohol or adulterated alcohol, or al-

cohol compounds with any other substance, in such proportion that it shall be capable of being used as a beverage and no prescription can be issued for alcohol to be diluted or adulterated or compounded with any other substance in such proportions that it shall be capable of being used as a beverage. Sec. 2, Session Laws of 1917, Chap. 19.

#### WEST VIRGINIA:

The law of 1921 provides for the sale by druggists through pharmacists of pure grain alcohol for medicinal purposes and provides that physicians may use the same in the practice of their profession subject to the provisions of the Federal law and the regulations issued thereunder. Laws of 1923, Chap. 29 (Barnes W. Va. Code Ann. Supp. 1923, Chap. 32-A, Sec. 4).

#### WISCONSIN:

Physicians may prescribe intoxicating liquor upon the condition and limitations of the Federal law provided such physician shall make application to the State Prohibition Commissioner and obtain a permit for which a fee of ten dollars is charged to be paid into the general fund of the State treasury. Laws 1921, Secs. 7-b and 9.

#### WYOMING:

Physicians may prescribe spirituous liquors to be taken internally in quantities not exceeding one pint for the same patient within a period of ten days. The physician must make application to the State Commissioner of Law Enforcement and obtain a permit to prescribe, which permits are in force for a period of

one year unless revoked for violation of the law. The physician must make a careful physical examination of the patient, or if this is found impracticable, then upon the best information obtainable, if he in good faith believes that the use of liquor by such patient as a medicine is necessary and will afford relief for some known ailment, he may issue such a prescription. The physician must keep a record alphabetically arranged of all prescriptions for liquor. Laws of 1921, Chap. 117, Sees. 5, 6 and 7. Language same as that of original Volstead Act, would probably receive same construction. (See 32 Op. Att. Gen. 467.)

Argument for Appellant in No. 245.

265 U.S.

(Const., Art. I, § 8, cl. 18,) and by the clause of the Eighteenth Amendment specifically conferring power to enforce by "appropriate legislation" the prohibition of traffic in intoxicating liquors for beverage purposes. P. 558.

4. The Court cannot say, in face of the contrary affirmation by Congress, that prohibiting traffic in intoxicating malt liquors for medicinal purposes has no real or substantial relation to the enforcement of the Eighteenth Amendment. P. 560.
5. Nor can it be held that the act is an arbitrary and unreasonable prohibition of the use of valuable medicinal agents, in view of the determination of Congress, and the evidence supporting it, that intoxicating malt liquors possess no substantial and essential medicinal properties, which, as respects the public health, cannot be supplied by permitting physicians to prescribe spirituous and vicious intoxicating liquors in addition to non-intoxicating malt liquors. P. 561.
6. Dealers in beer, ale and stout, who were prevented by the act from disposing of stocks acquired before it was passed, were not thereby deprived of property without due process of law in violation of the Fifth Amendment. P. 563.

Affirmed.

APPEALS from decrees of the District Court which dismissed the bills, for want of equity, in two suits brought by manufacturers and dealers in intoxicating malt liquors, to enjoin the Commissioner of Internal Revenue, and other officials, from enforcing a Supplemental Prohibition Act.

*Mr. Samuel W. Moore*, with whom *Mr. Marcus L. Bell* was on the briefs, for appellant in No. 245.

I. The allegation that Guinness's Stout is a valuable medicinal agent, is to be taken as true, for the purposes of this appeal, notwithstanding the provisions of the Willis-Campbell Act, being admitted by the motion to dismiss.

How can Congress, acting under a constitutional grant of authority to prohibit the manufacture and sale of intoxicating liquor for beverage purposes, prohibit the sale of a recognized medicinal agent for medicinal pur-

poses? The National Prohibition Act itself recognizes the value of malt as well as other liquor for medicinal purposes, and contains carefully drawn provisions which permit the use of intoxicants for medicinal purposes.

The sale and use of sacramental wines, the use of liquor in hospitals and sanitariums, and the use of industrial alcohol are also permitted. A great number of regulations have been made by the Commissioner, with the approval of the Treasury Department, throwing safeguards and restrictions around the sale and prescription of intoxicating liquor for medicinal purposes.

The Eighteenth Amendment did not clothe Congress with the general power to invade the domain of medical authority, or to substitute its judgment for the judgment of the attending physician. Much less may it select a recognized therapeutic agent, such as Guinness's Stout, and declare that it may not be prescribed for a patient, even though the attending physician regards it as essential or indispensable in bringing about a restoration to health. If Congress can select one recognized medical agent, and lawfully prohibit its use, there is no limit to which it may not go. *United States v. Freund*, 290 Fed. 411; *Lambert v. Yellowley*, 291 Fed. 640.

The determination of questions of fact is a judicial and not a legislative question. *Block v. Hirsh*, 256 U. S. 135; *Shoemaker v. United States*, 147 U. S. 282; *Producers Transportation Co. v. Railroad Commission*, 251 U. S. 228; *Monongahela Nav. Co. v. United States*, 148 U. S. 312.

II. The grant of power contained in the Eighteenth Amendment is limited by the reservations of the Tenth Amendment. The two amendments effect a division of legislative power over intoxicating liquor, the Congress and state legislatures being vested with concurrent legislative power over intoxicating liquor for beverage purposes, and the legislatures of the several States retaining

Argument for Appellant in No. 245.

265 U. S.

exclusive legislative power over intoxicating liquor for non-beverage purposes. *United States v. Lanza*, 260 U. S. 377.

It is true that Congress in the exercise of a delegated power, such as the power to prohibit the use of intoxicating liquor for beverage purposes, possesses the incidental power to enact such laws and make such regulations as will effectively prevent the manufacture, sale or transportation of intoxicating liquor for the prohibited purposes; but the exercise of this incidental power must stop short of the actual prohibition of the manufacture and sale of intoxicating liquor for non-beverage purposes. Otherwise the legislative control of the several States over intoxicating liquor for non-beverage purposes, reserved to them by the Tenth Amendment, would be nullified.

The incidental power of Congress to give full effect to a delegated power cannot, consistently with the Tenth Amendment, wholly deprive the States of the power which that amendment reserves to them. In other words, judicial construction cannot write into the Eighteenth Amendment authority to prohibit the manufacture and sale of intoxicating liquor for non-beverage purposes, as well as for beverage purposes. To do so would be to strike the words "for beverage purposes" from the amendment. Had the amendment when submitted to the legislatures of the several States contained a delegation of authority to Congress to prohibit the manufacture, sale or transportation of intoxicating liquor for non-beverage, as well as beverage, purposes, there is no reason to suppose that it would have received the ratification it did.

It is of the utmost importance to bear in mind that the power over the manufacture and sale of intoxicating liquor, similar to the power to regulate intrastate and interstate commerce, is a divided power, a part of this power being vested in the general government and a part

being reserved to state governments. The state powers may not encroach upon the power of Congress, nor may the power of Congress encroach upon the state power to the extent of occupying the entire legislative field. The Constitution itself creates a dividing line which neither may cross.

It should also be borne in mind that this is not a case where Congress acts in the exercise of a power covering the entire legislative field, as it did in *Ruppert v. Caffey*, 251 U. S. 264.

Nor is it like the case of *Purity Extract Co. v. Lynch*, 226 U. S. 192, where an act of the Legislature of Mississippi prohibiting the sale of malt liquors was upheld. There the state authority was exclusive, covering the entire legislative field, and it could regulate or prohibit as its public policy might require. In neither case was there any constitutional division of power between national and state governments.

III. The incidental power possessed by Congress to make effective its power to prohibit the sale of intoxicating liquor for beverage purposes, cannot be constitutionally exercised so as wholly to prohibit its sale for non-beverage purposes.

There are well-recognized limitations upon the incidental power of Congress to make effective the exercise of its authority under an express or delegated power. *Hammer v. Dagenhart*, 247 U. S. 251; *Child Labor Tax Case*, 259 U. S. 20; *Hill v. Wallace*, 259 U. S. 44. The right to control this subject matter has been exclusively reserved to the several States. While it may be incidentally affected by proper congressional action, it cannot be wholly destroyed. *Employers' Liability Cases*, 207 U. S. 463.

The Tenth Amendment is a limitation imposed by the Constitution upon the action of Congress, and this limi-

Argument for Appellant in No. 245.

265 U. S.

tation should receive a liberal, and not a narrow construction. *Fairbank v. United States*, 181 U. S. 283; *Monongahela Nav. Co. v. United States*, 148 U. S. 312; *Boyd v. United States*, 116 U. S. 616; *Adair v. United States*, 208 U. S. 161; *United States v. Dewitt*, 9 Wall. 41; *Collector v. Day*, 11 Wall. 113; *Keller v. United States*, 213 U. S. 138; *Kansas v. Colorado*, 206 U. S. 46.

Congress may go no further than is reasonably necessary to put an end to traffic in intoxicating liquor for beverage purposes. *Wisconsin R. R. Comm. v. Chicago, etc., R. R. Co.*, 257 U. S. 563.

The effect of the Eighteenth and Tenth Amendments, considered together, is to vest in the several States the power to regulate or prohibit the use of malt liquors for non-beverage purposes. The effect of this act, if valid, is to divest the States of every shred of authority over the subject.

IV. The enforcement of the act will deprive the appellant of its property without due process of law, and take its property for public use without just compensation, in violation of the Fifth Amendment. *Chicago & N. W. Ry. Co. v. Nye Schneider Fowler Co.*, 260 U. S. 35; *Truax v. Corrigan*, 257 U. S. 312; *Davidson v. New Orleans*, 96 U. S. 97; *Missouri Pacific Ry. Co. v. Humes*, 115 U. S. 512; *Scott v. Toledo*, 36 Fed. 385; *Caldwell v. Texas*, 137 U. S. 692; *Leeper v. Texas*, 139 U. S. 462; *Giozzi v. Tiernan*, 148 U. S. 657; McGhee, Due Process of Law, p. 60; Willoughby, Const., pp. 873, 874.

The act made no provision for compensating the appellant for the loss which it would sustain from its enforcement, nor did it postpone the effective date of the act for a period during which the appellant might dispose of its stock. Immediately upon its passage it was approved, and at once became effective. *Ruppert v. Caffey*, 251 U. S. 264, and *Mugler v. Kansas*, 123 U. S. 623, distinguished.

*Mr. Nathan Ballin*, with whom *Mr. William M. K. Olcott* and *Mr. Walter E. Ernst* were on the brief, for appellant in No. 200.

I. The Eighteenth Amendment prohibited the use of intoxicating liquors for beverage purposes only. Op. Atty. Gen., March 3, 1921; *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146; *Ruppert v. Caffey*, 251 U. S. 264; *National Prohibition Cases*, 253 U. S. 350.

In *Purity Extract Co. v. Lynch*, 226 U. S. 192, it was decided only that the State might in the exercise of its police power prohibit the use of non-intoxicating malt liquors in order effectually to carry out its state prohibition. There cannot, in the course of that opinion, be found any specific authority to hold that what was permitted to the States, was likewise delegated to Congress, for the prohibition of liquors for medicinal purposes was not included in the delegation of power covered by the Eighteenth Amendment. It is apparent that the power of the States to enforce prohibition, resting on the general rights of the State to regulate the health of its citizens, was a broader function, and not subject to the limitation which has been fastened upon Congress by the express language of the Eighteenth Amendment.

The distinction between national and state functions still remains, and the powers which are undelegated still rest in the States.

Among these functions, the power to regulate health was never delegated by the States to Congress, and is, therefore, a power expressly reserved to the States. It is apparent that the right to practice medicine, the right to manufacture drugs, and the right to manufacture liquors for medicinal purposes, still exist undisturbed, and that Congress has no express power to interfere with these rights. If, in the regulation of national prohibition for beverage purposes, it becomes necessary to establish certain restrictions upon the manufacture of intox-

Argument for Appellant in No. 200.

265 U. S.

eating liquors for non-prohibited purposes, these restrictions must always be taken in connection with the constitutional right of the individual to enjoy those privileges of life, liberty and pursuit of happiness, which are guaranteed to him under the Constitutions not only of the United States, but also of the States.

In the decisions of this Court, this distinction is manifested in the cases in which acts of Congress have been held to be unconstitutional because they violate state functions, or because Congress has transcended its power. *Marshall v. Gordon*, 243 U. S. 521.

That the exercise of the regulation of health is purely a matter of state control is exemplified in *Keller v. United States*, 213 U. S. 138; and *Hoke v. United States*, 227 U. S. 308.

More recently this Court has held that the power of Congress, even though intended to be beneficial, may not be asserted in respect to a purely state function. *Child Labor Tax Case*, 259 U. S. 20.

The power of the State in respect of health has also been recognized by such cases as *Jacobson v. Massachusetts*, 197 U. S. 11; *Dent v. West Virginia*, 129 U. S. 114; and *Watson v. Maryland*, 218 U. S. 173, in all of which the power of the State to regulate vaccination and the practice of medicine is distinctly asserted and established as a state and not a national function. See also *Hammer v. Dagenhart*, 247 U. S. 251. *United States v. Doremus*, 249 U. S. 86, distinguished.

A striking illustration of the constitutional right of a person to be treated medicinally as he chooses, or in fact, not to be treated at all, appears in *People v. Cole*, 219 N. Y. 98.

II. The prohibition of intoxicating malt liquors for medicinal purposes is neither an appropriate nor a reasonable exercise of the prohibitory power of Congress.

The power to prohibit the use of liquors as a beverage does not extend to the power to prohibit them as a medi-

cine. *Sarrs v. Commonwealth*, 83 Ky. 427; Freund, Police Power, p. 210; *Lambert v. Yellowley*, 291 Fed. 640; *United States v. Freund*, 290 Fed. 411.

May a legislature declare a scientific fact because it has instituted some investigation? Because of such investigation, may Congress arbitrarily assume that malt liquors have no medicinal properties? In its last analysis, the scientific or medicinal value of the product should rest with the physician. Congress has transgressed not only the constitutional right of the physician to determine what is beneficial for his patients, but also the constitutional right of the patient to receive from the physician the prescription of malt liquors, if the physician deems it best for the health of his patient. In this enactment Congress assumed a function which it did not constitutionally possess. The power to define what is intoxicating, namely, the limitation to an aleoholic content of  $\frac{1}{2}$  of one per cent., may not be extended so as to give Congress power, also, to declare non-medicinal a form of liquor which has been recognized by leading physicians as having marked medicinal and therapeutic properties.

*Mr. Joseph S. Auerbach*, with whom *Mr. Martin A. Schenck* was on the brief, on behalf of Samuel W. Lambert, by special leave of Court, as *amicus curiae*.

*Mr. Solicitor General Beck*, with whom *Mrs. Mabel Walker Willebrandt* and *Mr. Mahlon D. Kiefer* were on the brief, for appellees.

*Mr. H. H. Griswold*, on behalf of the Attorneys General of the States of Alabama, Arkansas, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, West Virginia and Wyoming, by special leave of Court, as *amicus curiae*.

Opinion of the Court.

265 U.S.

MR. JUSTICE SANFORD delivered the opinion of the Court.

These two cases were heard together. They involve the single question whether § 2 of the Supplemental Prohibition Act of November 23, 1921, c. 134, 42 Stat. 222, is constitutional, in so far as it prevents physicians from prescribing intoxicating malt liquors for medicinal purposes. This section of the act provides: "That only spirituous and vinous liquor may be prescribed for medicinal purposes, and all permits to prescribe and prescriptions for any other liquor shall be void."

The Eighteenth Amendment to the Constitution provides that "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States . . . for beverage purposes is hereby prohibited" (§ 1); and that "Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." (§ 2.)

The National Prohibition Act (41 Stat. 305), enacted in pursuance of this Amendment, provides that no person shall "manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor" except as authorized in the act, and that all its provisions shall be liberally construed to the end that "the use of intoxicating liquor as a beverage" may be prevented, Tit. II, § 3; that intoxicating liquor "for nonbeverage purposes" may be manufactured, sold, etc., "but only" as provided in the act, and the Commissioner of Internal Revenue may issue permits therefor, *Ib.*, § 3; that no one shall manufacture, sell or prescribe intoxicating liquor without first obtaining a permit from the Commissioner, § 6; that no permit shall be issued for the sale of intoxicating liquor at retail except through a pharmacist licensed to dispense medicine prescribed by physicians,

§ 6; that no one shall be given a permit to prescribe intoxicating liquor except a licensed practicing physician, § 6; that no one but a physician holding such permit shall issue any prescription for intoxicating liquor, § 7; and that not more than a pint of "spirituous liquor" shall be prescribed for the same person within any period of ten days, § 7.

Under the Regulations adopted by the Treasury Department after the passage of the act, physicians obtaining permits were authorized to prescribe only distilled spirits, wines, and certain alcoholic medicinal preparations. T. D. 2985. In October, 1921, pursuant to an opinion of the Attorney General that the Commissioner might issue permits for the manufacture of beer and other intoxicating malt liquors, as well as whisky and vinous liquors, for medicinal purposes (32 Ops. Atty. Gen. 467), the Regulations were amended so as to authorize the Commissioner to issue permits for the manufacture of intoxicating malt liquors for medicinal purposes, and to permit physicians to prescribe them. T. D. 3239.

In November Congress passed the Supplemental Act now in question, containing in § 2, as has been stated, the provision that "only spirituous and vinous liquor may be prescribed for medicinal purposes," and that all prescriptions for any other liquor<sup>1</sup> and permits therefor shall be void. The direct effect of this provision is to prohibit physicians from prescribing intoxicating malt liquors for medicinal purposes, and the Commissioner from issuing permits authorizing such prescriptions. This section also limits prescriptions for vinous liquor to one-

<sup>1</sup>The word "liquor" is used as meaning "intoxicating liquor" as defined in the Prohibition Act (Tit. II, § 1), including beer, ale, porter, and any malt liquor containing one-half of one per centum of alcohol by volume and fit for use for beverage purposes. Supp. Act, § 1.

JAMES EVERARD'S BREWERIES *v.* DAY, PROHIBITION DIRECTOR OF THE STATE OF NEW YORK, ET AL.

EDWARD AND JOHN BURKE, LIMITED, *v.* BLAIR, COMMISSIONER OF INTERNAL REVENUE, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 200 and 245. Argued March 4, 5, 1924.—Decided June 9, 1924.

1. Section 2 of the Supplemental Prohibition Act of November 23, 1921, in so far as it prevents physicians from prescribing intoxicating malt liquors for medicinal purposes, is constitutional. P. 557.
2. This provision does not violate the Tenth Amendment, since it is not an invasion of power reserved to the States. P. 558.
3. It is supported both by the implied power of Congress to make laws necessary and proper for executing powers expressly granted

Opinion of the Court.

265 U.S.

fourth of a gallon, containing not more than 24 per centum of alcohol, and provides that the vinous and spirituous liquor prescribed for any person within any period of ten days shall not contain more than one-half pint of alcohol.

James Everard's Breweries, the plaintiff in the first case, is a New York corporation. Prior to the passage of the Prohibition Act it had been engaged in the manufacture and sale of beer and other intoxicating malt liquors. After the Treasury Regulations had been amended, it obtained a permit for the manufacture of intoxicating malt liquor for medicinal purposes, and brewed a large quantity of beer, ale and stout for sale to pharmacists for resale on physician's prescriptions. When the Supplemental Act was passed it had on hand a large quantity of these intoxicating malt liquors which it could not thereafter sell in the conduct of its business, and of which it could only dispose, after de-alcoholization, at a heavy loss.

Edward and John Burke, Limited, the plaintiff in the second case, is a British corporation, engaged in bottling and distributing an intoxicating malt liquor known as Guinness's Stout. Prior to the passage of the National Prohibition Act it had maintained a branch of its business in New York. Early in November, 1921, the Commissioner refused it a permit to sell such stout for medicinal purposes because of the pendency in Congress of the Supplemental Prohibition Bill. At the time of the passage of the act it had on hand a large quantity of stout.

Each of these corporations brought a suit in equity in the District Court to enjoin the Commissioner of Internal Revenue and other federal officers from enforcing the provision of the Supplemental Act prohibiting the prescribing of intoxicating malt liquors for medicinal purposes, alleging that it was not authorized by the Eighteenth Amendment and was in conflict with other provisions

of the Constitution.<sup>2</sup> Each of these bills was dismissed by the District Court, for want of equity.<sup>3</sup> The plaintiffs then appealed directly to this Court. Jud. Code, § 238.

The contention that this provision of the Supplemental Act is unconstitutional, is based primarily upon the grounds: That the Eighteenth Amendment merely delegates to Congress the authority to prohibit the traffic in intoxicating liquors for beverage purposes, and the control of the traffic in such liquors for non-beverage purposes is reserved to the several States; that while Congress possesses the incidental power to regulate the traffic in intoxicating liquors for non-beverage purposes so far as is reasonably necessary to make effective the prohibition of the traffic in such liquors for beverage purposes, this incidental power is limited to reasonable regulation and does not extend to complete prohibition; and that the prohibition of prescriptions for the use of intoxicating malt liquors for medicinal purposes is neither an appropriate nor reasonable exercise of the power conferred upon Congress by the Amendment and infringes upon the

<sup>2</sup> In the Everard case the bill prayed that the Supplemental Act be declared unconstitutional; and that the defendants be enjoined from interfering with the plaintiff in manufacturing intoxicating malt liquors for medicinal purposes and selling the same to pharmacists; from interfering with pharmacists in purchasing and physicians in prescribing such liquors for such purposes; and from refusing to issue permits to pharmacists and physicians for such purposes. In the Burke case the bill prayed that the defendants be enjoined from enforcing the act and Treasury Regulations in so far as they prohibited the plaintiff from selling stout to pharmacists for medicinal purposes; from interfering with the plaintiff in making such sales; and from refusing to issue to the plaintiff and to pharmacists and physicians permits for the sale, purchase and prescribing of such stout.

<sup>3</sup> In the Everard case there was no opinion. In the Burke case the opinion was mainly based on the earlier opinion of the same court in *Piel Bros. v. Day*, 278 Fed. 223, which had been affirmed by the Circuit Court of Appeals, *per curiam*. 281 Fed. 1022.

Opinion of the Court.

265 U.S.

legislative power of the States in matters affecting the public health.

It is clear that if the act is within the authority delegated to Congress by the Eighteenth Amendment, its validity is not impaired by reason of any power reserved to the States. The words "concurrent power" as used in the second section of the Amendment "do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several States or any of them"; and the power confided to Congress, while not exclusive, "is in no wise dependent on or affected by action or inaction on the part of the several States or any of them." *National Prohibition Cases*, 253 U. S. 350, 387. And if the act is within the power confided to Congress, the Tenth Amendment, by its very terms, has no application, since it only reserves to the States "powers not delegated to the United States by the Constitution." See *McCulloch v. Maryland*, 4 Wheat. 316, 406; *Lottery Case*, 188 U. S. 321, 357.

We come then to the question whether this act is within the power conferred upon Congress by the Eighteenth Amendment. By its terms the Amendment prohibits the manufacture, sale or transportation of intoxicating liquors for beverage purposes, and grants to Congress the power to enforce this prohibition "by appropriate legislation." Its purpose is to suppress the entire traffic in intoxicating liquor as a beverage. See *Grogan v. Walker*, 259 U. S. 80, 89. And it must be respected and given effect in the same manner as other provisions of the Constitution. *National Prohibition Cases*, 253 U. S. 350, 386.

The Constitution confers upon Congress the power to make all laws necessary and proper for carrying into execution all powers that are vested in it. Art. I, § 8, cl. 18. In the exercise of such non-enumerated or "implied" powers it has long been settled that Congress is

not limited to such measures as are indispensably necessary to give effect to its express powers, but in the exercise of its discretion as to the means of carrying them into execution may adopt any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution. *United States v. Fisher*, 2 Cranch, 358, 395; *Martin v. Hunter's Lessee*, 1 Wheat. 304, 326; *McCulloch v. Maryland*, *supra*, pp. 421, 422; *Ex parte Curtis*, 106 U. S. 371, 372; *Legal Tender Case*, 110 U. S. 421, 440; *In re Rapier*, 143 U. S. 110, 134; *Logan v. United States*, 144 U. S. 263, 283; *Fong Yue Ting v. United States*, 149 U. S. 698, 712; *Lottery Case*, *supra*, p. 355; *Hoke v. United States*, 227 U. S. 308, 323. Furthermore, aside from this fundamental rule, the Eighteenth Amendment specifically confers upon Congress the power to enforce "by appropriate legislation" the constitutional prohibition of the traffic in intoxicating liquors for beverage purposes. This enables Congress to enforce the prohibition "by appropriate means." *National Prohibition Cases*, *supra*, p. 387.

It is likewise well settled that where the means adopted by Congress are not prohibited and are calculated to effect the object intrusted to it, this Court may not inquire into the degree of their necessity; as this would be to pass the line which circumscribes the judicial department and to tread upon legislative ground. *McCulloch v. Maryland*, *supra*, p. 423; *Legal Tender Case*, *supra*, p. 450; *Fong Yue Ting v. United States*, *supra*, p. 713. Nor may it enquire as to the wisdom of the legislation. *Legal Tender Case*, *supra*, p. 450; *McCray v. United States*, 195 U. S. 27, 54; *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 141. What it may consider is whether that which has been done by Congress has gone beyond the constitutional limits upon its legislative discretion. *Ex parte Curtis*, *supra*, p. 373.

It is clear that Congress, under its express power to enforce by appropriate legislation the prohibition of traffic in intoxicating liquors for beverage purposes, may adopt any eligible and appropriate means to make that prohibition effective. The possible abuse of a power is not an argument against its existence. *Lottery Case, supra*, p. 363; *Hamilton v. Kentucky Distilleries Co., supra*, p. 161. And it has been held that the power to prohibit traffic in intoxicating liquors includes, as an appropriate means of making that prohibition effective, power to prohibit traffic in similar liquors, although non-intoxicating. *Purity Extract Co. v. Lynch*, 226 U. S. 192; *Ruppert v. Caffey*, 251 U. S. 264.

The ultimate and controlling question then is, whether in prohibiting physicians from prescribing intoxicating malt liquors for medicinal purposes as a means of enforcing the prohibition of traffic in such liquors for beverage purposes, Congress has exceeded the constitutional limits upon its legislative discretion.

In enacting this legislation Congress has affirmed its validity. That determination must be given great weight; this Court by an unbroken line of decisions having "steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt." *Adkins v. Children's Hospital*, 261 U. S. 525, 544.

We cannot say that prohibiting traffic in intoxicating malt liquors for medicinal purposes has no real or substantial relation to the enforcement of the Eighteenth Amendment, and is not adapted to accomplish that end and make the constitutional prohibition effective. The difficulties always attendant upon the suppression of traffic in intoxicating liquors are notorious. *Crane v. Campbell*, 245 U. S. 304, 307. The Federal Government in enforcing prohibition is confronted with difficulties similar to those encountered by the States. *Ruppert v.*

*Caffey, supra*, p. 297. The opportunity to manufacture, sell and prescribe intoxicating malt liquors for "medicinal purposes," opens many doors to clandestine traffic in them as beverages under the guise of medicines; facilitates many frauds, subterfuges and artifices; aids evasion: and, thereby and to that extent, hampers and obstructs the enforcement of the Eighteenth Amendment. A provision in a revenue act which tends to diminish the opportunity for clandestine traffic in avoidance of the tax, has a reasonable relation to its enforcement. *United States v. Doremus*, 249 U. S. 86, 94.

Nor can it be held that the act is an arbitrary and unreasonable prohibition of the use of valuable medicinal agents.

When the bill was pending in Congress the Judiciary Committee of the House of Representatives held an extended public hearing, in which it received testimony, among other things, on the question whether beer and other intoxicating malt liquors possessed any substantial medicinal properties. Hearings before House Judiciary Committee on H. R. 5033, Serial 2, May 12, 13, 16, 17, 20, 1921. On the information thus received the Committee recommended the passage of the bill. H. R., 67th Cong., 1st sess., Rep. No. 224.<sup>4</sup> And in the light of all the

<sup>4</sup> In its report the Committee said: "The evidence presented to the committee to the effect that beer has never been recognized as a medicine was overwhelming. The United States Pharmacopoeia has never listed it as a medicine. One hundred and four of the leading physicians and scientists in the Nation signed the following statement: 'The undersigned physicians of the United States desire to place on record their conviction that the manufacture and sale of beer and other malt liquors for medicinal purposes should not be permitted. Malt liquors never have been listed in the United States Pharmacopoeia as official medicinal remedies. They serve no medical purpose which can not be satisfactorily met in other ways, and that without the danger of cultivating the beverage use of an alcoholic liquor.' Several thousand other physicians signed the

Opinion of the Court.

265 U. S.

testimony Congress determined, in effect, that intoxicating malt liquors possessed no substantial and essential medicinal properties which made it necessary that their use for medicinal purposes should be permitted, and that, as a matter affecting the public health, it was sufficient to permit physicians to prescribe spirituous and vinous intoxicating liquors in addition to the non-intoxicating malt liquors whose manufacture and sale is permitted under the National Prohibition Act.

Neither beer nor any other intoxicating malt liquor is listed as a medicinal remedy in the United States Pharmacopoeia. They are not generally recognized as medicinal agents. There is no consensus of opinion among physicians and medical authorities that they have any substantial value as medicinal agents; and while there is some difference of opinion on this subject the question is, at the most, debatable. And their medicinal properties, if any, may, it appears, be supplied by the use of other available remedies. That the opinion is extensively held that the prohibition of prescription of malt liquors is a necessary and proper means to the suppression of the traffic in intoxicating beverages likewise appears from the legislation in many States, under which such prescriptions are not permitted.

The distinction made by Congress between permitting the prescription of spirituous and vinous liquors while prohibiting the prescription of malt liquors is not plainly

---

above, or a similar statement, and presented it to the committee. The attorney for the Anheuser-Busch Co. (Inc.) appeared before the committee and called attention to the fact that if beer was permitted as a medicine it would be impossible to enforce the prohibition law. There was only one doctor who appeared before the committee in favor of beer as a medicine, and the New York County Medical Association, the official medical association of New York, denied that he spoke for them in favoring beer for medicinal purposes."

unreasonable or without a substantial justification, based upon their essential differences.

We find, on the whole, no ground for disturbing the determination of Congress on the question of fact as to the reasonable necessity, in the enforcement of the Eighteenth Amendment, of prohibiting prescriptions of intoxicating malt liquors for medicinal purposes. See *Radice v. New York*, 264 U. S. 292.

It cannot be said that its action in this respect violated any personal rights of the appellants protected by the Constitution. That it did not take their property in violation of the Fifth Amendment, is clear. *Ruppert v. Caffey*, 251 U. S. 264, 301, and cases there cited.

We are unable to say that the provision of the Supplemental Act is an arbitrary and unreasonable exercise of the power vested in Congress by the Eighteenth Amendment or that it is not "appropriate legislation" for its enforcement.

The decrees of the District Court are

*Affirmed.*